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FOURTH UNITED NATIONS CONFERENCE
TO REVIEW ALL ASPECTS OF THE SET OF
MULTILATERALLY AGREED EQUITABLE
PRINCIPLES AND RULES FOR THE CONTROL
OF RESTRICTIVE BUSINESS PRACTICES
Geneva, 25-29 September 2000
Item 4 of the provisional agenda

ADOPTION OF THE AGENDA AND ORGANIZATION OF THE WORK OF THE CONFERENCE

Annotated provisional agenda and organization of work

GE.00-51252 (E)

I. PROVISIONAL AGENDA

1. Opening of the Conference

2. Election of the President and other officers

3. Adoption of the rules of procedure

4. Adoption of the agenda and organization of work of the Conference

5. Credentials of the representatives to the Conference:

   (a) Appointment of a Credentials Committee

   (b) Report of the Credentials Committee

6. Review of all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices:

   (a) Review of application and implementation of the Set

   (b) Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices

7. Other business

8. Adoption of the report of the Conference.

II. ANNOTATIONS

1. The General Assembly, in its resolution 52/182 of 18 December 1997, decided to convene a Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The Conference is to be held under the auspices of UNCTAD at Geneva in 2000. The Intergovernmental Group of Experts on Competition Law and Policy, at its second session, which took place from 7 to 9 June 1999, acted as the preparatory body for the Conference. The report of the Intergovernmental Group is contained in document TD/B/COM.2/19-TD/B/COM.2/CLP/14.

Item 1 - Opening of the Conference

2. The Conference will be opened at 10 a.m. on Monday, 25 September 2000, by the Secretary-General of UNCTAD or by his representative.

Item 2 - Election of the President and other officers

3. The provisional rules of procedure of the Conference provide in rule 7 that the Conference shall elect, with due regard to equitable geographical distribution, a President, a Rapporteur and 17 Vice-Presidents. The President, the 17 Vice-Presidents and the Rapporteur shall constitute the Bureau of the Conference.

4. In line with past practice, the Bureau should have the following regional distribution: Groups A and C combined: 9; Group B: 6; Group D: 3; and China: 1.

Item 3 - Adoption of the rules of procedure

5. The provisional rules of procedure of the Conference, as approved by the previous three Conferences, are contained in TD/RBP/CONF.5/2.

Item 4 - Adoption of the agenda and organization of work of the Conference

6. The text of the provisional agenda, as set out in section I above, was approved by the Intergovernmental Group of Experts on Competition Law and Policy at its second session (see chapter IV, para. 32, and annex I of TD/B/COM.2/19-TD/B/COM.2/CLP/14.

(a) Negotiating Group and subsidiary bodies

7. Rule 44 of the provisional rules of procedure of the Conference provides that the Conference shall establish a Negotiating Group and that it may establish such other subsidiary bodies as it deems necessary. Rule 45 states that the President of the Conference shall be the Chairman of the Negotiating Group and that other subsidiary bodies shall elect their own officers as may be required.

(b) Regional group meetings

8. Appropriate time and facilities shall be made available daily throughout the duration of the Conference for regional group meetings.

(c) Facilities available

9. There will be interpretation facilities available from 10 a.m. to 1 p.m. in the mornings and from 3 p.m. to 6 p.m. in the afternoons throughout the duration of the Conference.

(d) Work of the Conference and the Negotiating Group

10. The Conference has available to it five working days. It is suggested that the first meeting, on 25 September, be devoted to procedural matters, namely items 1 to 5 (a) of the provisional agenda, as well as to opening statements, and that the last meeting, on 29 September, be devoted to item 5 (b), "Report of the Credentials Committee", Item 7, "Other business", and

item 8, "Adoption of the report of the Conference". The remaining meetings would be devoted to the substantive item on the agenda (item 6) and to the informal consultations referred to in paragraph 15 below. A proposed programme of work is provided in the annex to this document.

Item 5 - Credentials of the representatives to the Conference

11. Rule 5 of the provisional rules of procedure provides that a Credentials Committee of nine members shall be appointed at the beginning of the Conference. Its composition shall be based on that of the Credentials Committee of the General Assembly of the United Nations.

Item 6 - Review of all aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

(a) Review of application and implementation of the Set

12. In acting as preparatory body for the Review Conference, the Intergovernmental Group of Experts on Competition Law and Policy, at its second session on 29-31 July 1999, invited the Secretary-General of UNCTAD to prepare an assessment of the operation of the Set (agreed conclusions, para. 7, contained in chapter I of document TD/B/COM.2/19-TD/B/COM.2/CLP/14). This note will be submitted to the Conference in document TD/RBP/CONF.5/3. In addition, Governments will be invited to present their views on the implementation of the Set under this agenda item.

(b) Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices

13. The Intergovernmental Group of Experts on Competition Law and Policy, at its second session, adopted agreed conclusions which are being forwarded to the Fourth Review Conference, as contained in chapter I of its report TD/B/COM.2/19-TD/B/COM.2/CLP/14.

14. In order to assist the Review Conference in its work, the Intergovernmental Group of Experts, in its agreed conclusions, welcomed regional initiatives in convening preparatory meetings for the Fourth Review Conference, with the assistance of the UNCTAD secretariat, focusing on reviewing their respective experiences in the implementation of the Set. In this respect, a number of regional UNCTAD seminars and workshops have been convened, the results of which will be submitted to the Review Conference.

15. The Intergovernmental Group of Experts on Competition Law and Policy further recommended that the Fourth Review Conference consider the following issues related to the better implementation of the Set:

(a) Experience gained so far with the establishment of competition laws and competition authorities and enforcement of the law and competition advocacy in developing countries, countries with economies in transition, and relevant regional organizations;

(b) Organization and powers of competition authorities, including how to determine enforcement priorities;

(c) Treatment of confidential information in competition law and policy;

(d) The role of competition policy in economic development;

(e) Competition policy issues in telecommunications; and

(f) Competition policy and its implications for regulatory and legislative reforms.

16. Accordingly, the Conference will hold informal consultations to exchange views on these important competition policy issues. Governments are invited to submit short notes on their interventions in advance to the UNCTAD secretariat in order for these to be reproduced and made available to participants.

17. The Intergovernmental Group of Experts also requested the UNCTAD secretariat to prepare for consideration by the Fourth Review Conference:

(a) A revised report on the experiences gained so far with international cooperation on competition policy issues and the mechanisms used, taking into account commentary and information to be received from member States by 31 January 2000;

(b) An updated review of technical assistance, taking into account the information to be submitted by member States and international organizations no later than 31 January 2000;

(c) A report on how competition policy addresses the exercise of intellectual property rights, taking into account commentary and information to be received from member States by 31 October 1999; and

(d) An updated version of the Model Law taking into account recent trends in competition legislation and its enforcement. It should be understood that the Model Law and its commentary do not affect the discretion of countries to choose policies considered appropriate for themselves, and that the Model Law and its commentary should be periodically reviewed in the light of reforms and trends at the national and regional levels.

18. Accordingly, a revised report on "Experiences Gained so far with International Cooperation on Competition Policy Issues and the Mechanisms Used" will be made available in document TD/RBP/CONF.5/4. An updated "Review of Technical Assistance" will be submitted in document TD/RBP/CONF.5/5 and a report on "How Competition Policy Addresses the Exercise of Intellectual Property Rights" will be available in document TD/RBP/CONF.5/6. Finally, an updated version of the Model Law containing new provisions for merger control will be made available in TD/RBP/CONF.5/7.

Item 7 - Other business

Item 8 - Adoption of the Report of the Conference

19. Rule 52 of the provisional rules of procedure states that the Conference may recommend to the General Assembly the adoption of amendments to the Set of Principles and Rules. Rule 52 also provides that the Conference may approve and open for signature a Final Act. It may also, as was the case for the Second Review Conference in 1990, adopt a resolution.

20. Rule 52 of the provisional rules of procedure provides that the Conference shall adopt a report on its proceedings. The final report will be submitted to the United Nations General Assembly.

Annex

PROPOSED PROGRAMME OF WORK

Monday, 25 September	a.m.	Agenda items 1-5 (a) and opening statements
	p.m.	Agenda item 6 (a)
Tuesday, 26 September	a.m.	Agenda item 6 (a)
	p.m.	Agenda item 6 (b)
Wednesday, 27 September	a.m.	Informal consultations (topics listed in para. 15 (a) and (b))
	p.m.	Informal consultations (topics listed in para. 15 (c) and (d))
Thursday, 28 September	a.m.	Consideration of the outcome of the Conference
	p.m.	Consideration of the outcome of the Conference
Friday, 29 September	a.m.	Informal consultations (topics listed in para. 15 (e) and (f))
	p.m.	Agenda items 7 and 8

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OF THE SET OF MULTILATERALLY AGREED EQUITABLE
PRINCIPLES AND RULES FOR THE CONTROL OF
RESTRICTIVE BUSINESS PRACTICES
Geneva, 25 September 2000
Item 3 of the provisional agenda

ADOPTION OF THE RULES OF PROCEDURE OF THE FOURTH REVIEW CONFERENCE

Note by the UNCTAD secretariat

In keeping with past practice, and in conformity with the *modus operandi* followed by the First, Second and Third Review Conferences, it is proposed that the Fourth Review Conference follow the draft provisional rules of procedure contained in TD/RBP/CONF.3/2, copies of which are made available for the Conference.

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Fourth United Nations Conference to Review
All Aspects of the Set of Multilaterally Agreed
Equitable Principles and Rules for the Control
of Restrictive Business Practices
Geneva, 25 September 2000
Item 6 (a) of the provisional agenda

REVIEW OF ALL ASPECTS OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(a) REVIEW OF APPLICATION AND IMPLEMENTATION OF THE SET

Assessment of the operation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

EXECUTIVE SUMMARY

This note, prepared by the Secretary-General of UNCTAD, reviews major developments which have taken place at the national, regional and multilateral levels in the field of competition law and policy, more particularly since November 1995, when the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was held. At the multilateral level, mention is made of UNCTAD's cooperation with the World Bank and WTO, as well as the outcome of UNCTAD X (February 2000). The note then reviews in part II the operation of the Set in the field of competition, looking at its main provisions, drawing attention to their actuality and evaluating the extent to which they have been implemented to date. In part III, an evaluation is made of progress in implementation by States members of UNCTAD and by the Intergovernmental Group of Experts on Competition Law and Policy of the resolution adopted by the Third Review Conference, drawing attention to technical cooperation, informal consultations and specific studies undertaken by the Group. Finally, in part IV, the note looks at possible activities in the field of competition law and policy which the Fourth Review Conference might wish to launch in the light of the decisions taken by UNCTAD X.

GE.00-51713 (E)

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I. INTRODUCTION

1. Almost 20 years have passed since the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was adopted by the United Nations General Assembly in resolution 35/63 of 5 December 1980, and yet, on the multilateral front, the Set is still the only fully multilateral framework on competition in existence today. The issue of competition law and policy, however, has undoubtedly achieved a higher profile at the national, regional and multilateral levels. At the national level, some 60 countries, including developing countries and economies in transition, have adopted competition laws. In addition, most other countries are now aware of the importance of competition policy, and many, including least developed countries, are in the process of drafting competition legislation. At the regional level, numerous groupings of States, such as the Free Trade Area of the Americas (FTAA), the Permanent Secretariat of the General Treaty on Central American Economic Integration (SIECA), the Caribbean Community (CARICOM) and MERCOSUR in the Americas, the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC) and the Central African Customs and Economic Union (UDEAC) in Africa, and the Asia-Pacific Economic Cooperation Forum (APEC) and the South Asian Association for Regional Cooperation (SAARC) in Asia, have established or are in the process of establishing working groups on competition, and some intend to adopt regional competition rules.

2. UNCTAD, the World Bank, WTO and OECD have been very active in spreading competition law and policy principles throughout the world, while competition authorities of member States have also been very active in this field, both bilaterally and through active cooperation with international organizations. Another indication of the higher profile given to competition by international organizations is the increasing number of publications issued in this respect.[1]

3. In the period between the Third United Nations Conference to Review All Aspects of the Set in 1995 and the Fourth Review Conference (scheduled for 25-29 September 2000), two Expert Meetings on Competition Law and Policy and two sessions of the Intergovernmental Group of Experts on Competition Law and Policy have taken place at UNCTAD. The second session of the Intergovernmental Group of Experts (Geneva, 7-9 June 1999) acted as the preparatory meeting for the Fourth Review Conference.

4. The Singapore Declaration of December 1996,[2] which established two new Working Groups at WTO - a Working Group on Trade and Investment, and a Working Group on the Interaction between Trade and Competition Policy - requested the latter group "to identify areas that may merit further consideration in the WTO framework". In the Singapore Declaration, it was agreed that "these groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate international forums". In the conduct of the WTO Working Groups, cooperation with UNCTAD and other appropriate organizations was called for "to make the best use of available resources and to ensure that the development dimension is taken fully into account" (para. 20 of the Singapore Declaration). In line with the Singapore Declaration, UNCTAD has been represented in the Working Group on the Interaction between Trade and Competition Policy in an observer capacity, and it has cooperated to the fullest extent in ensuring that the development dimension is

taken fully into account. Special attention was drawn by UNCTAD to the provision for preferential and differential treatment contained in Section B of the Set of Principles and Rules. Cooperation has included the holding of four joint WTO/UNCTAD/World Bank Symposia on Competition Policy, Economic Development and the Multilateral Trading System. In its agreed conclusions of June 1999 (TD/B/COM.2/19-TD/B/COM.2/CLP.14, chapter I), the Intergovernmental Group of Experts on Competition Law and Policy invited the Secretary-General of UNCTAD to continue cooperation with WTO and other organizations working in the area of competition law and policy.

5. In February 2000, UNCTAD X took place in Bangkok. The Conference, which examined "developmental strategies in an increasingly interdependent world: applying the lessons of the past to make globalization an effective instrument for the development of all countries and all people", considered the role of competition law and policy in this context and agreed that: "In addition to national efforts, the international community as a whole has the responsibility to ensure an enabling global environment through an enhanced cooperation in the fields of trade, investment, competition and finance and to contribute to currency stability, so as to make globalization more efficient and equitable" (Bangkok Declaration: Global Dialogue and Dynamic Engagement, TD/387). It is important to note that competition was included among UNCTAD's top priorities in contributing to making globalization both more efficient and more equitable. In fact, it is agreed in the Set (see in particular para. 10 below, dealing with objective No. 2) that competition increases efficiency. Moreover, the Set also recognizes that competition policy is aimed at creating a more equitable environment (see para. 11 below, on Objective No. 3 of the Set, which is "to protect and promote social welfare ... and the interests of consumers" and the Set itself, which is entitled "Set of Equitable Principles and Rules", in particular because it endorses the principle of "preferential or differential treatment for developing countries", as embodied in Section C of the Set, as described in para. 12 below).

6. In addition to the Bangkok Declaration, UNCTAD X adopted a Plan of Action (contained in TD/386) which contains the following decisions with respect to competition issues:

> "140. UNCTAD should continue and expand its help to interested countries in developing their national regulatory and institutional framework in the area of competition law and policy.
>
> 141. UNCTAD's work in this area should, in cooperation with UNDP, the World Bank and other relevant organizations, strengthen the capacity of public institutions for competition and consumer protection in developing countries and help them to educate the public and representatives of the private sector in this field.
>
> 142. UNCTAD should continue to examine issues related to competition law and policy of particular relevance to development. It should prepare periodical reports on restraints in strategic sectors and their impact on developing countries and countries with economies in transition, particularly on their competitiveness. UNCTAD should study in depth the developmental impact of possible international agreements on competition.

143. UNCTAD should also further study, clarify and monitor, including through specific country and case studies, the relationship between competition and competitiveness as well as trade-related aspects of competition."

7. The Fourth Review Conference will certainly wish to reflect upon these important issues, which should be embodied in UNCTAD's further programme of work in the field of competition law and policy. The Conference might also wish to reflect upon and take a decision on the proposal made by some delegations during UNCTAD X, but which was not decided during UNCTAD X, of establishing within UNCTAD a new Expert Meeting on Consumer Policy, to act as a separate body from the Intergovernmental Group of Experts on Competition Law and Policy.

II. OPERATION OF THE SET

8. Objective No. 1 of the Set, namely "to ensure that restrictive business practices do not impede or negate the realization of the benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries", is of particular relevance today, as globalization is rapidly expanding and more and more questions are being raised concerning the effects of liberalization and globalization of world markets, especially with respect to the weaker players on the global stage.

9. One important issue is the rapidly growing concentration of market power which is taking place in global markets through mergers and acquisitions, constantly raising the level of entry for new players in such markets. While important actions to challenge abuses of dominant positions of market power are taking place in some developed countries,[3] most developing countries are still unable to come to grips with the creation and abuse of dominant market power affecting their national interests both in domestic markets and, especially, in world markets. It should be noted that in line with the request made by the Intergovernmental Group of Experts on Competition Law and Policy in its agreed conclusions (TD/B/COM.2/19-TD/B/COM.2/CLP/14, Chapter I, op. para. 10), the UNCTAD secretariat is making available to the Fourth Review Conference a Revised Model Law (document TD/RBP/CONF.5/7), which contains specific merger control rules and commentary thereupon.

10. With respect to Objective No. 2, namely "to attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through (a) the creation, encouragement and protection of competition; (b) control of concentration of market power; (c) encouragement of innovation", the results have been mixed during the period under review. Although since 1995 most developing countries and economies in transition have shown interest in competition policy and many have requested technical assistance and advisory services to draft new legislation, to date only a few have actually adopted new competition laws: Panama, Hungary and Romania (in 1996), Zimbabwe (in 1997) and Morocco (in 1999). Moreover, as discussed in the concluding part of this note, it is not sufficient for a country to have a competition law on its statute books; it is necessary for its competition policy to have an effective impact on the economy. Setting up a competition authority can take time, and political will is necessary to sustain the momentum in the years that follow its establishment. Some

countries undergoing economic crises or changes of government may find that their Governments have changed priorities, and some competition authorities which enjoyed political support when they were established may now face decay and loss of support from the executive power.

11. Objective No. 3, namely "to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries", is receiving increased attention in some countries. As a result of UNCTAD IX's decision to request the UNCTAD secretariat to "support strategies in promoting national competition and consumer protection law and policy formulation" (TD/377, para. 97 (ii)), UNCTAD has implemented technical assistance programmes which include a strong consumer protection component. While the immediate objective of modern competition law is to increase efficiency by promoting competition, one of its important side effects is no doubt to benefit consumers. Moreover, it is increasingly felt that one way to overcome difficulties in implementing competition policy in many developing countries where this is a very new concept which needs to be widely understood is to create and strengthen consumer organizations, which can usefully contribute to consumer information, improve transparency and often draw the attention of competition authorities to anti-competitive practices. As seen in paragraph 6 above, UNCTAD X, in its Plan of Action, paragraph 141, calls upon UNCTAD, in cooperation with other relevant organizations, to strengthen the capacity of public institutions for competition and consumer protection in developing countries, and to help them to educate the public and representatives of the private sector in this field.

The development dimension in the Set

12. Section C, on multilaterally agreed equitable principles for the control of RBP, recognizes in its paragraph 6 the possibility for national legislation to exclude certain sectors from the scope of national competition law, and in paragraph 7 provides for "preferential or differential treatment for developing countries" in order to take into account "the development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in:

(a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and

(b) Encouraging their economic development through regional or global arrangements among developing countries".

13. At a time when UNCTAD and other appropriate intergovernmental forums are being called upon "to ensure that the development dimension is taken fully into account",[4] it is important to draw attention, as UNCTAD representatives have done repeatedly at WTO and other meetings, to the development dimension contained in the Set. In line with provision C.7 of the Set, developing countries should be in a position, if need be, to adopt new competition legislation in a progressive or more flexible manner, i.e. by being able to exempt certain sectors from full application of the law if this is considered necessary for developmental reasons. It should be recalled that exceptions to and exemptions from competition laws still exist in many developed countries, for example in sectors such as agriculture, mining and services. While

pressure to deregulate most of those sectors is having an effect in many countries, it should be borne in mind that some countries have maintained such exceptions and exemptions for some 50 years. A degree of flexibility for countries newly opening their market is therefore fully in line with this provision of the Set. Developing countries concerned with the risk of eliminating local industry as a result of the sudden opening of specific markets to strong competition should therefore be in a position to take a more flexible, gradualistic approach in order to ensure that liberalization takes place when their industries are more efficient and are able to compete. Of course, it is not in the interest of countries to keep afloat industries that are never going to be viable without protection and subsidies, thus distorting the allocation of scarce resources.

14. In some countries, small and medium-sized enterprises are allowed to join forces in certain instances, for example in joint-purchasing arrangements in Germany, which allow them to secure conditions of purchase similar to those secured by large firms for their inputs, hence enabling them to compete more effectively with the larger enterprises. Under the Set, similar considerations would be fully justified for developing countries.

15. Interestingly, the European Community, in its submission to the eleventh meeting of the WTO Working Group on the Interaction between Trade and Competition Policy,[5] supports the idea of "flexibility" and "progressivity" in the introduction and implementation of national competition laws in conformity with the kind of multilateral framework on competition which they suggest for adoption at the WTO. With respect to sectoral exclusions, the submission states that "The European Community and its Member States also favour a flexible and progressive approach to the issue of sectoral exclusions from the application of competition law. Some exclusions of a horizontal nature - like, for instance, those which may apply to small- and medium-sized enterprises - may be driven by legitimate development considerations and have only an insignificant impact on international trade". Such proposals, if agreeable to other parties, could be a significant step in the right direction. It is recalled in this connection that the WTO/GATT itself has long applied the principle of "special and differential treatment for developing countries", and that such a flexible approach, in order to take full account of the development dimension, would be fully in line with existing GATT/WTO practice.

The main anti-competitive practices

16. Section D of the Set, on principles and rules for enterprises, including transnational corporations, contains the core anti-competitive practices that should be refrained from by enterprises "engaged on the market in rival or potentially rival activities" or when "through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition" (Section D, paras. 3 and 4). The treatment of horizontal and vertical restraints, as well as dominance and abuse of dominant market power, is further elaborated in UNCTAD's Model Law or Laws on Restrictive Business Practices, of which the latest version is submitted to the Fourth Review Conference in document TD/RBP/CONF.5/7. The full text of the Model Law has been made more "reader-friendly" in that it now contains a number of boxes answering basic questions, and comparative tables indicating the types of laws or solutions adopted by countries for different aspects of the law, as well as a separate new chapter on merger control.

17. The Model Law now contains in its Part I a list of draft possible elements for articles of a competition law, including the title of the law; its objectives or purpose; definitions and scope of application; restrictive agreements or arrangements; acts or behaviour constituting an abuse, or acquisition and abuse, of a dominant position of market power; merger control provisions; some possible aspects of consumer protection; notification; the administering authority and its organization; functions and powers of the administering authority; sanctions and relief; appeals; and actions for damages. This quite simple "backbone" or "table of contents" of issues to consider when drafting a competition law is then complemented in Part II of the Model Law with detailed commentary on the articles, in which a review is made of actual laws in both developed and developing countries, as well as countries in transition, with a view to determining the most recent trends and views on how best to treat each one of the issues considered in the "elements for articles" of the law contained in Part I.

18. It should be noted that some "elements for articles", such as "some possible aspects of consumer protection", "notification" or perhaps "action for damages", are listed in the Model Law as part of a checklist of issues to be considered for inclusion, but it will depend on legislators to decide whether or not to include them in the competition law. For example, the most recent trend has been to adopt consumer protection provisions in an entirely separate law, since competition law is now viewed by most countries as having the promotion of competition as its principal objective and separate legislation is felt necessary in order to cover more fully the issue of consumer protection. Also, with respect to mergers and acquisitions, the new version of the Model Law recognizes that certain countries might wish to adopt competition law while refraining from having merger control, at least for a while.

19. Section E of the Set, on principles and rules for States at national, regional and subregional levels, and section F, on international measures, complement each other, as the call in paragraph 1 of Section E for States "at the national level or through regional groupings" to "adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures" and the provisions calling for exchanges of information and cooperation in Section E are somewhat complemented in Section F, which calls for "work aimed at achieving common approaches" (para. 1); consultations among States (para. 4); continued work within UNCTAD on the elaboration of a Model Law or Laws (para. 5); and technical assistance, advisory and training services (para. 6).

20. As indicated in the introduction to this note, in the period since the Third Review Conference there has been considerable interest on the part of developing countries and economies in transition in studying the issues involved and in drafting competition bills. However, relatively few developing countries have adopted new competition laws in the period under review. It can be said, nevertheless, that most countries in the world are now aware of the issues involved in competition policy, and that many envisage the adoption of domestic legislation in the near future. One can also say that common approaches and trends are on the increase, largely as a result of the important exchanges of views and consultations that take place within the framework of bilateral, regional and multilateral consultations, for example under bilateral cooperation agreements where they exist, and consultations in OECD, the WTO Working Group and UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy at its annual sessions.

21. The informal consultations which take place annually during sessions of the Intergovernmental Group of Experts on Competition Law and Policy have become an appreciated feature of UNCTAD's intergovernmental machinery. This function of the Intergovernmental Group was decided on by the Third Review Conference (para. 9 of the resolution adopted by the Review Conference).[6]

22. Concerning Section G of the Set, on international institutional machinery, it is important to note that while retaining the functions of the Intergovernmental Group of Experts, by recommending in paragraph 13 of its resolution "the continuation of the important and useful work programme within UNCTAD's intergovernmental machinery that addresses competition law and policy issues, and proceeds with the active support and participation of competition law and policy authorities of member countries", the Third Review Conference recommended to the General Assembly that it change the name of the Intergovernmental Group of Experts on Restrictive Business Practices to the Intergovernmental Group of Experts on Competition Law and Policy (para. 14 of the resolution). This recommendation was endorsed by the General Assembly in its resolution 52/182, paragraph 5, of 18 December 1997, and in 1998 and 1999 the Intergovernmental Group of Experts met under its new name.

III. PROGRESS IN IMPLEMENTATION OF THE RESOLUTION ADOPTED BY THE THIRD REVIEW CONFERENCE

23. The resolution adopted by the Third Review Conference (TD/RBP/CONF.4/15, annex I) requested the UNCTAD secretariat to revise documents presented to the Review Conference (para. 1), to revise periodically the commentary to the Model Law (para. 3) and to prepare a draft outline of a possible study on empirical evidence of the benefits to be gained by countries from applying competition law and policy principles to economic development (para. 8). All these studies were prepared in line with the requests contained in the resolution.

24. The UNCTAD secretariat was also requested to carry out a review of technical cooperation activities undertaken by UNCTAD and other international organizations, as well as by States bilaterally. That review was contained in document TD/B/COM.2/EM/9 and was submitted to the Expert Meeting on Competition Law and Policy on 24 November 1997; updated reviews were submitted to the Intergovernmental Group of Experts on Competition Law and Policy in 1998 and 1999; and a new review will be submitted to the Fourth Review Conference in document TD/RBP/CONF.5/5.

25. Requests for technical assistance were met more rapidly than in the past, owing in particular to increased voluntary contributions and expertise received from, among others, Norway, the Netherlands, Italy, France, Germany, the United Kingdom, the United States, the European Union and Sweden, in line with the Review Conference's appeal contained in paragraph 7 of its resolution. As can be seen in detail in the reviews of technical cooperation mentioned above, the UNCTAD secretariat has made a considerable effort to respond as much as possible to the needs expressed by member States at the national as well as subregional levels. It should also be noted that the Working Party on the Medium-Term Plan and the Programme Budget of the Trade and Development Board at its thirty-fourth session conducted an in-depth

evaluation of UNCTAD's programme of technical cooperation activities on competition law and policy in September 1999 (TD/B/WP/119), in which UNCTAD's work in this area was highly praised by participating delegations.

26. With respect to the operation of the Intergovernmental Group of Experts itself, the Third Review Conference decided to promote informal multilateral consultations among participants on competition law and policy issues with a special focus on practical cases (para. 9 of its resolution). As agreed by the Review Conference, at each session of the Intergovernmental Group of Experts on Competition Law and Policy, an understanding is reached as to the subject matter of the consultations to be undertaken during the next session. In addition, member States are invited, if they so wish, to submit additional cases for discussion during the consultations, at least one month in advance of the session of the Intergovernmental Group of Experts so as to permit delegations from all member States to participate.

27. It should be noted that in paragraph 9 of its resolution, the Third Review Conference requested that "future Intergovernmental Group of Experts sessions should include at least three days for informal multilateral consultations". However, this was decided at a time when the duration of sessions was five days; the post-Midrand duration of expert meeting sessions, and subsequently intergovernmental groups of experts, was shortened to three days, and for this reason, the time allotted for informal consultations was three to four half-day sessions. This arrangement seems to have been very satisfactory, as the functioning of the Expert Meeting, followed by the Intergovernmental Group of Experts on Competition Law and Policy, was highly praised by all delegations at UNCTAD's Mid-Term Review, which took place in 1998.

28. In paragraph 11 of its resolution, the Review Conference decided that, "in the light of the strong worldwide trend towards the adoption or reform of competition laws and the development of national competition laws and policies over the period since the Set was adopted, the Intergovernmental Group of Experts should embark on an exercise, upon request from member States and in collaboration with national and regional competition law and policy authorities, to map out and further strengthen common ground among States in the area of competition law and policy in identifying restrictive business practices that affect the economic development of countries. In this context, the focus of the exercise, *inter alia*, should be on:

(a) Identifying 'common ground', i.e. broad similarities in the approaches followed on different competition law and policy questions by Governments;

(b) Shedding light and encouraging exchanges of views in those areas where the identification of 'common ground' is more difficult, for example where there are differences among economic theories, or among competition laws or policies, such as:

(i) The role of competition law and policy in the strengthening and improvement of the economies of developing and other countries and, in particular, the development of the business community;

(ii) Taking into account economic globalization and liberalization of the economies of developing and other countries, to identify appropriate measures to help those countries that might be hampered by RBPs;

(iii) The interface between competition law and policy, technological innovation and efficiency;

(iv) The competition law and policy treatment of vertical restraints and abuses of dominant positions;

(v) The competition policy treatment of the exercise of intellectual property rights (IPRs) and of licences of IPRs or know-how;

(vi) In-depth analysis of differences in the scope of competition laws and policies in individual sectors, in the light of the process of economic globalization and liberalization;

(vii) In-depth analysis of the effectiveness of enforcement of competition laws, including enforcement in cases of RBPs having effects in more than one country."

29. The competition experts and the UNCTAD secretariat have, through the informal consultations and the work embarked upon at the Expert Meetings and sessions of the Intergovernmental Group of Experts on Competition Law and Policy, as well as in technical cooperation programmes, contributed consistently to identifying the extent of "common ground" that exists in the approaches followed by States on different competition law and policy questions; in so doing, they have also shed light and exchanged views on those areas where differences exist. In particular, the study on "empirical evidence of the benefits of competition law and policy" (TD/B/COM.2/EM/10/Rev.1) responds at least in part to paragraph 11 (b) (i) of the conference resolution, and the study on "How competition policy addresses the exercise of intellectual property rights"(TD/RBP/CONF.5/6), submitted to the Fourth Review Conference, should respond to paragraph 11 (b) (v) and in part to paragraph 11 (b) (iii). The question raised under paragraph 11 (b) (iv) was partly treated in document UNCTAD/ITCD/CLP/Misc.8 on vertical restraints, prepared by the secretariat in connection with its technical cooperation projects. Finally, while a first attempt to analyse the effectiveness of enforcement of competition laws in cases of restrictive business practices having effects in more than one country was made in document TD/RBP/CONF.4/6, submitted to the Third Review Conference itself, no further attempt has been made to make further progress on the topic referred to in paragraph 11 (b) (vii) of the resolution.

30. The issues which so far have not been directly dealt with by the Intergovernmental Group of Experts concern the topics referred to in paragraphs 11 (b) (ii) and (vi). These are important issues relating to the developmental dimension of competition law and policy that the Fourth Review Conference might wish to focus on.

31. Finally, the Third Review Conference, in paragraph 12 of its resolution, invited Governments "during future consultations in meetings of the Intergovernmental Group of Experts, to clarify the scope or application of their competition laws and policies, with a view to improving mutual understanding about substantive principles and procedures of competition law and policy, taking into account relevant provisions of the Uruguay Round Agreements. In the context of this exercise, Governments may wish to discuss:

(a) How the Set of Principles and Rules might be better implemented, particularly those provisions which have not been adequately implemented so far;

(b) The competition policy implications at the national, regional and international levels of globalization and liberalization;

(c) Techniques and procedures for detecting and sanctioning collusive tendering, including international cartels and other anti-competitive practices;

(d) The strengthening of information exchange, consultations and cooperation in enforcement at the bilateral, regional and multilateral levels;

(e) How competition laws and policy should apply to State activities such as regulation of State enterprises, State monopolies, natural monopolies and enterprises with exclusive rights granted by the State."

32. Again, the informal consultations and the studies prepared for the expert meetings, as well as some papers prepared for technical cooperation activities, have covered or are in the process of covering some of the issues noted above. In particular, the report on "Experiences gained so far with international cooperation on competition policy issues and the mechanisms used", submitted in document TD/RBP/CONF.5/4 to the Fourth Review Conference, should contain important elements of response to paragraph 12 (d) above. Two papers prepared by the secretariat in the context of technical cooperation, namely "Control of price-fixing and collusive tendering arrangement" (UNCTAD/ITCD/CLP/Misc.4) and "Competition and public utility industries" (UNCTAD/ITCD/CLP/Misc.1), should at least partly respond to paragraphs 12 (c) and (e) respectively. Furthermore, the topic for the informal consultations of the 1999 session of the Intergovernmental Group of Experts on Competition Law and Policy - on "The relationship between the competition authority and relevant regulatory agencies, especially in respect of privatization and demonopolization processes"- should contain important elements of response to paragraph 12 (e) of the resolution.

33. Under paragraph 12 of the resolution, two points have so far not been substantially analysed, namely (a) how the Set might be better implemented, and (b) the competition policy implications of globalization and liberalization at national, regional and international levels. Some thoughts on a response to these questions will be found in the concluding remarks below.

IV. OUTLOOK FOR THE FOURTH REVIEW CONFERENCE

34. The Fourth Review Conference will have an exceptional opportunity to build upon the results of UNCTAD X and the work already undertaken in implementation of the resolution adopted by the Third Review Conference in November 1995. As mentioned earlier in this note, in referring to the Bangkok Declaration, UNCTAD X fully recognized the role of competition policy in bringing about a more equitable playing field at national, regional and multilateral levels.

35. Furthermore, in its plan of action, it requests UNCTAD to "continue and expand its help to interested countries in developing their national regulatory and institutional framework in the area of competition law and policy" (Plan of Action, para. 140).

36. Resources permitting, UNCTAD intends to expand its technical assistance advisory and training services to all interested developing countries and economies in transition. This activity will include not only responding to requests for national expertise and advisory services related to drafting competition legislation, including by organizing national seminars and exchanges of expert personnel for on-the-job training in experienced competition authorities both in developed and developing countries, but also cooperating with relevant research and academic institutions and the United Nations Staff college, in line with paragraph 165 of the UNCTAD X Plan of Action.

37. UNCTAD should also, "in cooperation with UNDP, the World Bank and other relevant organizations, strengthen the capacity of public institutions for competition and consumer protection in developing countries and help them to educate the public and representatives of the private sector in this field" (para. 141). This decision by UNCTAD X is fully consonant with views expressed now and again by member countries (see, for example, Part III of the United States submission to the meeting of the WTO Working Group of 15-16 June 2000)[7]. That submission appropriately notes that there is little value mainly in enacting an antitrust law and leaving it a formality. In order to ensure the successful adoption and maintenance of pro-competitive policies throughout an economy, competition values must be understood and supported throughout society, including government, business, consumers and academia. Therefore, any new competition authority's priorities should include competition advocacy, and the creation of a "culture of competition" by educating society about competition. In this connection, the Fourth Review Conference will consider *inter alia*, in its informal consultations, experience gained so far with the establishment of competition laws and competition authorities, enforcement of the law and competition advocacy in developing countries, countries with economies in transition and relevant regional organizations. The Conference might wish to study further how best to develop ways and means to educate society at large about competition issues, including through technical cooperation programmes.

38. UNCTAD X also decided that UNCTAD "should continue to examine issues related to competition law and policy of particular relevance to development. It should prepare periodical reports on restraints in strategic sectors and their impact on developing countries and countries with economies in transition, particularly on their competitiveness" (para. 142). In this connection, the Fourth Review Conference is scheduled to discuss specifically "the role of competition policy in economic development" and competition policy in strategic sectors such as telecommunications and regulated industries. Such informal consultations might serve as a basis for launching studies in these specific issues, bearing in mind that essential strategic sectors such as telecommunications, which serve the rest of the economy, have an essential function in contributing to the economy's overall competitiveness.

39. Moreover, UNCTAD X requested UNCTAD to "study in depth the developmental impact of possible international agreements on competition" (para. 142, cont'd.). The Fourth Review Conference will have before it for consideration a revised version of the study entitled

"Experiences gained so far on international cooperation on competition issues and the mechanisms used" (TD/RBP/CONF.5/4). The Conference may wish to pursue further study of possible international agreements on competition and their effect on development.

40. UNCTAD X finally decided to "further study, clarify and monitor, including through specific country and case studies, the relationship between competition and competitiveness as well as trade-related aspects of competition" (para. 143). The Fourth Review Conference might wish to initiate specific studies related to these issues. In particular, the relationship with the TRIPS Agreement is discussed in document TD/RBP/CONF.5/6 on "How competition policy addresses the exercise of IPRs". This analysis will be further refined by the guidance given by experts at the Fourth Review Conference. UNCTAD will undoubtedly launch new studies on the relationship between competition and competitiveness, bearing in mind the study prepared by the Intergovernmental Group of Experts on "The role of competition policy in economic reforms in developing and other countries" (TD/RBP/CONF.4/2). The Fourth Review Conference might wish to give guidance to the secretariat regarding priority action in this respect.

41. Since the Third Review Conference in 1995, the general convergence of views and relative optimism about market liberalization and globalization have given way to a more mitigated analysis and often pessimistic views, fuelled by financial crises and economic problems around the world, especially in emerging markets, to the effect that globalization - often understood as reflecting "free competition at the global level" - far from having positive effects for all trading partners, increases economic disparities among countries, with the result that a number of developing countries, particularly the least developed countries, run the risk of marginalization. It should be stressed in this respect that the actual process of globalization is far from having been one of free competition where the principles of competition policy apply with uniformity at the global level. While developed countries apply those principles with respect to their domestic markets, few developing countries have so far been able to implement their competition rules effectively within their national borders. In many developing countries and economies in transition, the competition authority is new, lacking in experience and especially in financial resources, and often unable to count on continued political support. In addition, most of these countries have been used to State intervention in closed economies, and the fundamental principles of competition are new for their economic actors, businessmen and consumers. The advocacy function and educative role of the competition authority represent a considerable task which needs commensurate financial resources and, above all, time. Moreover, global markets often escape from competition rules altogether, because of the difficulties that national authorities face in coming to grips with anti-competitive practices originating in overseas markets. Hence, the system in operation so far can be compared to a market which has been partly liberalized, but where competition rules still need to be fully implemented. If liberalization and globalization are to prove beneficial, progress will have to be achieved in enforcing competition policy at the national, regional but also multilateral - or global - levels.

42. The United Nations Set, as reconfirmed by three Review Conferences, has the value of being so far the only fully multilaterally agreed principles and rules on competition. Also, it

encompasses the development dimension by endorsing the principle of special and differential treatment, especially for the least developed countries. Meeting after UNCTAD X, the Fourth Review Conference will have a full opportunity to make its contribution to bringing about a more equitable and efficient playing field both in national and in global markets, as called for in the Bangkok Declaration.

Notes

[1] See, for example, UNCTAD, *World Investment Report 1997* (United Nations publication, Sales No. E.97.II.D.10), and WTO, *Annual Report 1997*.

[2] The Singapore Declaration (WT/MIN(96)/DEC/W) was adopted on 13 December 1996 at the close of the WTO Ministerial Conference, held in Singapore from 9 to 13 December 1996.

[3] See, for example, *United States Government v. Microsoft, Inc.*

[4] See Singapore Ministerial Declaration (WT/MIN(96)/DEC/W) of 13 December 1996, para. 20.

[5] Document WT/WGTCP/W/160 of 8 June 2000, part 3.1, pp. 7-8.

[6] See TD/RBP/CONF.4/15, annex I.

[7] Document WT/WGTCP/W/142 ("Creating a culture of competition issues involved in establishing an effective antitrust agency"), submitted by the United States to the WTO Working Group on the Interaction between Trade and Competition Policy.

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PRINCIPLES AND RULES FOR THE CONTROL
OF RESTRICTIVE BUSINESS PRACTICES
Geneva, 25 September 2000
Item 8 (a) of the provisional agenda

EXPERIENCES GAINED SO FAR ON INTERNATIONAL COOPERATION ON COMPETITION POLICY ISSUES AND THE MECHANISMS USED

Report by the UNCTAD secretariat

GE.00-51398 (E)

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Executive summary

This report focuses on three types of international instruments dealing with competition law and policy, namely: bilateral competition law enforcement cooperation agreements; free trade, customs union or common market agreements; and multilateral instruments. The implementation of such agreements has helped to minimize conflicts among Governments and to facilitate enforcement in this area. However, several concerns continue to impede the further development of enforcement cooperation. Moreover, developing countries have not so far significantly participated in such cooperation. To overcome such impediments and to promote the participation of developing countries, it would be necessary to build up mutual confidence gradually, by evolving from simple to more complex cooperation agreements.

Balanced cooperation among developing countries would provide a learning experience and help ensure that cooperation with more advanced partners was fruitful. Free trade or common market agreements might provide a conducive framework for this purpose, but regional rules, institutions and mechanisms would need to be adapted accordingly, and a degree of compatibility ensured among national, subregional and interregional competition regimes. The consultations mechanism established under the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices might be used to discuss how this might be done and what might be the appropriate balance between convergence and diversity in competition laws and policies; it might also promote cooperation in specific cases. Such consultations could provide an input to the ongoing discussions or any future negotiations within the World Trade Organization.

INTRODUCTION

1. **In line with a request made by** the Expert Meeting on Competition Law and Policy, held in November 1997,[1] * the UNCTAD secretariat * **submitted** a preliminary report of a study on experiences gained so far in international cooperation on competition policy issues and the mechanisms **used** * to the first session of the Intergovernmental Group of Experts on Competition Law and Policy, held from 29 to 31 July 1998. **The Group of Experts requested** * the UNCTAD secretariat to prepare for consideration * **at its second session a report on the same subject** *.[2] **At that second session, held from 7 to 9 June 1999, the Group of Experts requested the UNCTAD secretariat to prepare for consideration by the Fourth Review Conference a revised report on the same subject, taking into account commentary and information to be received from member States by 31 January 2000.** * **The present** report has been prepared in response to this request; **it takes into account comments received on the previous report, and also updates the information provided in the previous report.**[3] Additions to the text have been indicated in bold script; deletions have been indicated with stars.

2. For the purposes of this study, international cooperation in the area of competition law and policy is interpreted in a broad sense, covering * cooperation aimed at: **(a)** avoiding conflicts between Governments; * **(b)** facilitating enforcement against restrictive business practices (RBPs) (which is reciprocal in principle); * **(c) provision of** technical assistance for adopting, reforming or enforcing competition law and policy by countries which are more experienced in this domain to those less experienced; * **(d)** the promotion of convergence or harmonization of competition laws or policies; **and (e) within the context of a regional grouping, the strengthening of economic integration.** However, the present study mainly concentrates on (a) **and (b)** (experiences in respect of technical assistance are discussed in TD/B/COM.2/CLP/12). **It should be noted that, in practice, any cooperation agreement or cooperative activity may have more than one of these objectives, which are indeed often interlinked.**

3. International cooperation in this area can take place either on an informal basis, or in pursuit of the application of an international instrument (the term "instrument" is used here to cover both legally binding treaties or agreements and non-binding recommendations or undertakings). Chapter I describes different types of bilateral, regional, plurilateral and multilateral cooperation instruments with a bearing on competition law and policy. Chapter II describes experiences in cooperation on competition law and policy. Factors which have either facilitated cooperation or made it more difficult are analysed, and suggestions are made as to how it might be developed. Finally, three annexes to this study respectively list a selection of three types of instruments dealing with competition law and policy, namely: bilateral agreements on competition law enforcement; free trade, customs union or common market agreements; and multilateral and plurilateral instruments. Only instruments currently in force are referred to, in a roughly chronological order.

Chapter I

INSTRUMENTS OF INTERNATIONAL COOPERATION ON COMPETITION LAW AND POLICY

A. Overview

4. This chapter distinguishes **among** the following six types of international instruments dealing with competition law and policy **(the first four types of which are of a bilateral nature):** (a) bilateral agreements focusing on cooperation in competition law enforcement; (b) * mutual legal assistance treaties, which would apply to criminal antitrust cases as well as other criminal cases; (c) friendship, commerce and navigation treaties concluded between the United States and several other countries, which include clauses referring to cooperation on antitrust matters; (d) * agreements for technical cooperation in economic regulation, including competition law and policy; (e) free trade, customs union or common market agreements, including regional or subregional agreements or bilateral agreements concluded within a regional framework, covering competition law and policy as one element in a broader relationship; and (f) multilateral instruments, whether or not they are of a legally binding nature, which are universally applicable or are of a plurilateral nature, and cover a range of issues or focus specifically on competition law and policy. In practice, the borderlines between these different categories of instruments are often blurred, while other instruments not mentioned here may also have some bearing on competition law and policy. Some typical provisions of such agreements and notable features of specific agreements are described below. **While bilateral enforcement agreements and some multilateral instruments deal solely with competition law and policy, other types of agreements deal with cooperation on competition law and policy as one element in a wider agreement.** Each type of instrument is dealt with in a separate section of this chapter *.

B. Bilateral agreements on competition law enforcement

5. As may be seen from annex 1, the United States is party to most of the agreements of this type *; **it has such agreements with Australia, Brazil, Canada, the European Union, Germany, Israel and** Japan. * **The European Union has so far concluded such agreements only with Canada and the United States but, as discussed below, has agreed to undertake enforcement cooperation with some other countries within the context of free trade, customs union or common market agreements.** Typical provisions of many of these agreements include: notification of enforcement activities affecting the other party's important interests; commitments to take into account the other party's significant interests when investigating or applying remedies against RBPs (traditional comity); consultations to resolve conflicts between the parties' respective laws, policies and national interests; coordinated action in respect of related RBPs occurring in both countries; requests for assistance in investigations when RBPs on the territory of the party requested are adversely affecting the significant interests of the requesting party; requests for enforcement of an order by one party in the territory of another party; and commitments (subject to compatibility with national laws and important interests, and to the availability of resources) to give serious consideration to such requests for investigatory assistance or enforcement, including by providing non-confidential information and, in a few cases, confidential information (subject to safeguards). While the older agreements

of this type are usually more concerned with avoiding or managing conflicts between Governments arising out of enforcement proceedings (particularly where extraterritorial action is involved), the newer generation of agreements, while still concerned with avoiding conflicts, also often aim at collaborative international action against RBPs.

6. However, these two objectives of conflict avoidance and collaboration against RBPs may be interlinked. Some recent agreements, for instance, provide for "positive comity", under which requests by one country's competition authority to another country's authority to initiate or expand proceedings against RBPs originating in the latter's territory which adversely affect the first country's important interests should be seriously considered by the authority so requested. The response to such requests remains voluntary; conversely, the requesting country retains the right to initiate or re-institute its own enforcement. It is also expressly recognized in such agreements that parallel investigations may be appropriate where both markets are harmed. The first bilateral competition agreement to include positive comity provisions was the 1991 agreement between the United States and the Commission of the European Communities, which was complemented by the 1998 agreement between them (which does not apply to mergers), which introduces "enhanced positive comity", that is, a presumption that the competition authorities of an affected party will defer or suspend their own enforcement where its consumers are not directly harmed, or where the anti-competitive activities occur principally in and are directed principally towards the other party's territory (the United States federal enforcement agencies are bound by this agreement, but not the courts). Each party pledges to devote adequate resources and its best efforts to investigate matters referred to it and to inform the other side's competition authorities on request, or at reasonable intervals, of the status of the case. In practice, positive comity would appear to come into play mainly when the requesting party is seeking to protect its export trade, reducing recourse to extraterritorial action in such cases. While it would not be necessary for the *requesting* country's competition laws to be infringed for a request to be made, the *requested* country's competition laws would need to be infringed for action to be considered; thus, positive comity would not enable action to be taken against export cartels, for instance.

7. However, such a limitation may not necessarily apply to the provision of investigatory assistance. Under the International Antitrust Enforcement Assistance Act of 1994, the United States federal competition authorities are authorized (subject to reciprocity and not in the case of mergers) to conclude international agreements providing for the possibility of exchange of confidential information on a case-by-case basis (provided certain conditions are met), and to employ compulsory processes to acquire information at the request of a foreign competition authority whose important national interests are affected by anti-competitive behaviour organized within the United States, even if such behaviour is not illegal under United States law. The only agreement concluded so far on this basis is the 1997 agreement between the United States and Australia. **It has recently been recommended that the United States antitrust authorities expand the jurisdictions with which they have modern antitrust cooperation agreements, including those that feature positive comity provisions; cooperative arrangements should be sought with qualified jurisdictions that have newer competition systems as well as those with newly established competition laws.[4] It has also been suggested that cross-border cooperation in reviewing mergers should be encouraged and further deepened, and work-sharing arrangements be developed.**

C. * Mutual legal assistance treaties

8. Antitrust cooperation in criminal cases can take place through bilateral mutual legal assistance treaties applying to criminal matters generally. Although the United States has concluded such treaties with a number of countries, the only one under which antitrust cooperation has taken place is the Treaty between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters (1990). This provides for, *inter alia*, the obtention of evidence regarding possible criminal offences (including through the use of compulsory processes such as search warrants) and sharing of confidential information (subject to safeguards relating to divulgation).

D. Friendship, commerce and navigation treaties

9. Friendship, commerce and navigation (FCN) treaties concluded between the United States and a number of other countries contain clauses relating to cooperation on competition law enforcement. Under the 1954 FCN treaty between Germany and the United States, for instance, each Government agrees to consult with the other, at the request of either, with respect to RBPs having harmful effects upon commerce between their respective territories, and to take such measures, not precluded by its legislation, as it deems appropriate to eliminate such harmful effects. However, it is now many years since treaties of this nature were concluded between the United States and other countries.

E. Technical cooperation agreements

10. There are also bilateral agreements which organize technical assistance on competition law in the context of assistance on different forms of economic regulation. Under a 1992 technical cooperation agreement between the French Direction-Générale de la Consommation et de la Répression des Fraudes (DGCCRF) and the Direction-Générale de la Consommation (DGCN) of Gabon, for example, the two authorities undertake to cooperate in such areas as competition policy, consumer protection, unfair competition, product quality and safety, and price control. In the implementation of this agreement, the DGCN has sent personnel to centres run by the DGCCRF for short-term or long-term training, initially in price control, and now in competition law. **There is a similar agreement between France and the Russian Federation.**

F. Free trade, customs union or common market agreements

11. These agreements, which are often of a regional nature, may, depending on the degree of integration envisaged among the parties thereto **and the scope of supranational powers granted to the institutions created**, contain rights and obligations of varying strength and detail relating to, *inter alia*, the adoption or maintenance and effective enforcement of competition laws and policies; competition norms applicable to trade between the parties, sometimes with the concomitant exclusion of anti-dumping and/or countervailing duty trade remedies; substantial harmonization of competition laws; control of subsidies; control of discriminatory or other action by State enterprises or enterprises with special or exclusive rights; enforcement of common norms by supranational institutions; consultations on, and coordination of, enforcement between national and supranational institutions and among national institutions; dispute settlement; and technical assistance.[5] A fundamental difference between such agreements and the types of

bilateral agreements referred to above is that the former include substantive competition rules **providing for some degree of harmonization (although this is far less pronounced in the case of free trade agreements)**, rather than just procedural rules relating to cooperation; **this is no doubt due to their market integration objectives**. The most advanced regional system of competition rules is that of the European Union, which is also at the centre of a web of agreements with neighbouring countries involving varying intensities of cooperation in competition law and policy. The **competition policy** system * within the European Union **(which, because of its supranational character, goes beyond just inter-State cooperation)** also appears to provide a model for some of the subregional groupings in Africa and Latin America, albeit with some variations. An alternative model is that created under the North American Free Trade Agreement (NAFTA), which provides for a much less intense degree of cooperation. Cooperation envisaged so far within the Asia-Pacific region is even less intense, except for the close collaboration between Australia and New Zealand in this area.

12. The European Union has supranational competition rules (relating to RBPs, to public undertakings and undertakings granted special or exclusive rights, and to subsidies), which are linked by the Treaty of Rome to the fundamental objective of establishing a common market. These rules apply to practices affecting trade between member States, even if they occur within a single European Union country or an area within a country. There is provision for: coexistence between national and European Union competition laws, subject to the primacy of European Union law; a system for allocating competence among European Union and national competition authorities and courts (* **which** may also apply European Union law), aimed at balancing subsidiarity with the uniformity of the competition regime within the European Union; cooperation in the investigation or evaluation of practices; exchange of documents (including confidential information); representation at hearings; the communication of opinions on draft decisions for comments; and the provision by institutions of the European Union to national institutions of information or rulings on facts or European Union law. **However, there are legal obstacles to the exchange of confidential information between the European Commission and national authorities, as well as among national authorities. The Commission has now proposed devolving to national jurisdictions its powers under article 85 of the Treaty of Rome to investigate RBPs and to grant exemptions (article 86 can already be enforced at the national level); the Commission would continue to undertake enforcement in cases which are of general importance to the EU.** A step further in cooperation has recently been taken by the competition authorities of France, Germany and the United Kingdom, which have established a single form for the notification of mergers falling within the jurisdiction of at least two of these authorities. Anti-dumping or countervailing duty action among members of the European Union is precluded. Special sectoral arrangements are provided for under the Treaty Establishing the European Coal and Steel Community.

13. Under the Agreement on the European Economic Area (EEA), concluded by the European Union with most countries of the European Free Trade Area (EFTA), all practices liable to impinge on trade and competition among the EEA participants are subject to rules that are virtually identical to European Union competition law. Either the European Commission or the EFTA Surveillance Authority have supranational authority over practices affecting trade within the area (there are rules for allocation of jurisdiction between them). There are provisions for the exchange of information (applying even to confidential information), consultations (including the communication of opinions by an authority in proceedings brought before the

other authority), coordinated enforcement and dispute settlement; anti-dumping and countervailing duty action within the EEA is precluded. However, the accession of many former EFTA countries to the European Union has now reduced the practical scope of the Agreement on the EEA. As regards those EFTA countries not party to the EEA, there are procedures under free trade agreements for consultations and conciliation relating to practices affecting trade with the European Union.

14. Under the Europe agreements between the European Union and most **Central and** Eastern European and Baltic countries, supplemented by implementing rules for the application of the competition provisions applicable to undertakings and to State aid (implementing rules have not yet been adopted in some cases), competition standards based upon European Union competition rules are applicable where trade between the European Union and the other signatory is affected. In addition, the other signatories are bound to ensure the approximation of their existing and future competition legislation with European Union competition law (which is not required under EEA or even European Union rules), and their national legislation to implement the agreements needs to be approved by the association councils established under the agreements. Where cases fall within the competence of both parties, the European Union and the other party are to notify each other of any action envisaged (unless the transmission of information is prohibited by law or is incompatible with their respective interests); notification is also required where a case falling within the exclusive competence of one party would affect the important interests of the other party. Provision is made for consultations and the possibility of requests by one party to the other to take remedial action against RBPs having harmful cross-border effects. Consultation with the association councils is necessary before action can be taken against a practice deemed not to have been adequately dealt with **by the other party**. The Europe agreements make no provision for supranational competition authorities, and do not apply to trade among the Eastern European countries themselves (unlike among the EFTA members of the EEA). State aid may be granted to enterprises of the Eastern European countries concerned under rules similar to the European Union rules applicable to the least prosperous regions of the European Union. * **E**xemptions are provided for the grant of State aid in connection with the Common Agricultural Policy or the Treaty Establishing the European Coal and Steel Community, or to practices which are necessary for the attainment of the objectives of these two instruments. Enterprises with special or exclusive rights cannot engage in practices enabling them to restrict trade or to discriminate between nationals of the European Union and those of the other countries. Each party must inform the other party before imposing anti-dumping or countervailing duty measures. Similar obligations have been extended to Cyprus and Turkey under free trade agreements.

15. Under the Euro-Mediterranean agreements, obligations similar to those under the Europe agreements, except in respect of the requirement to align competition rules, have been extended to trade between the European Union and several Mediterranean countries. Implementing rules for these Euro-Mediterranean agreements have not yet been adopted. Negotiations on other Euro-Mediterranean agreements are proceeding with other Mediterranean countries. Less far-reaching partnership and cooperation agreements have also been concluded between the European Union and countries of the Commonwealth of Independent States (CIS), under which the parties agree to work to remedy or remove restrictions on competition, whether caused by enterprises or by State intervention, and to enforce their competition laws, and the members of the CIS are to endeavour to ensure that their competition legislation is gradually made

compatible with that of the European Union. The granting of export aid is restricted and further negotiations on other types of aid is provided for. Technical assistance is an important component of these agreements. Similar obligations limited to the energy sector are provided for under the Energy Charter Treaty concluded by the European Union with some members of the CIS. Even lower-intensity cooperation is provided for under a network of framework coöperation agreements concluded between the European Union and its member States and, respectively, Argentina (2 April 1990), the Central American republics (1993), the member countries of the Andean Pact (21 January 1993), Brazil (29 June 1995), the Southern Common Market (MERCOSUR) (15 December 1995) and Chile (21 June 1996); in the context of provisions on cooperation in a broad range of areas, the parties agree to hold a regular dialogue on the monitoring of RBPs, to identify and eliminate obstacles to industrial cooperation by means of measures which encourage respect for competition laws, and to make resources available for these purposes. Negotiations are under way for the conclusion of free trade agreements with Chile * and MERCOSUR; **agreements have been concluded with Mexico and South Africa which provide for mechanisms for the enforcement of both parties' competition laws. * The recent Partnership Agreement between the African, Caribbean and Pacific States (ACP) and the EU and its Member States (the Cotonou Agreement) provides that the Parties will reinforce cooperation for formulating and supporting effective competition policies with the appropriate national competition agencies so as to progressively ensure effective enforcement, including by assistance in drafting and enforcing an appropriate legal framework.**

16. While the European Union is at the centre of agreements with all of these countries or regional groupings, agreements have also been concluded among some of the countries which are party to agreements with the European Union. The EFTA countries not party to the EEA have available long-standing procedures for mandatory consultations and dispute settlement relating to practices affecting trade among EFTA countries. Free trade agreements with competition provisions have also been concluded by some EFTA countries and by Israel with some Eastern European countries, as well as within this latter group of countries, under the Central European Free Trade Agreement (which provides for general information exchange and notification of individual cases). Cooperation agreements on anti-monopoly matters have been concluded by Poland with Ukraine (December 1993) and with the Russian Federation (March 1994); **agreements have also been concluded by Romania with Belarus, Bulgaria, the Czech Republic, Georgia and the Russian Federation**. The CIS has also agreed, in the context of the creation of an economic union among its members, to create conditions for fair competition, including a mechanism for anti-monopoly regulation. A * **Treaty on Conducting the Agreed Antimonopoly Policy** has now been signed; the Coordination Council of the Anti-monopoly Agencies monitors its implementation, and provides a mechanism for exchanging experiences and for assisting in the improvement and the implementation of national legislation. But all the agreements to which the European Union is not a party tend to involve relatively weaker rights and obligations.

17. Competition law and policy is starting to be addressed more extensively in African subregional agreements, often on the basis of the model of the Treaty of Rome. The 1964 Brazzaville Treaty Establishing the Central African Customs and Economic Union (UDEAC), already provided that means should be found to achieve the progressive elimination of RBPs in trade among member States. The Treaty Establishing the Economic and Monetary

Community of Central Africa (CEMAC) which, when in force, will replace the UDEAC treaty, provides for the establishment of common competition rules to control both RBPs and governmental activities; two draft regulations dealing respectively with these two subjects, are currently being elaborated. In pursuance of the Treaty on the Harmonization of Business Law in Africa, it is also proposed to elaborate and adopt a uniform act dealing with competition law, which would have direct legal effect on the territory of its 16 member States from West and Central Africa.[6] Under the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA), the member States agree, in terms similar to article 85 of the Treaty of Rome, to prohibit RBPs which have as their object or effect the prevention, restriction or distortion of competition within the Common Market, with a proviso for the granting of exemptions by the COMESA Council. The Council is to elaborate regulations on competition within member States. Subsidies distorting competition which affect trade among member States are also prohibited, subject to some exceptions. The Southern African Development Community (SADC) has agreed that member States shall implement measures within the Community that prohibit unfair business practices and promote competition.

18. In the Latin American region, the 1973 Treaty Establishing the Caribbean Community (CARICOM) is relatively cautious in its approach. The member States recognize that certain practices (defined along the lines of articles 85 and 86 of the Treaty of Rome), are incompatible with the Caribbean Common Market insofar as they frustrate the benefits expected from the trade liberalization required by the CARICOM Treaty. If any such practice is referred to the CARICOM Council, it may publish a report on the matter. The Council is to consider whether further provisions dealing with RBPs are necessary; no such provisions have been adopted so far. Member States also undertake to introduce as soon as practicable uniform legislation for controlling RBPs, giving particular attention to practices affecting intra-CARICOM trade. State aid affecting subregional trade is also prohibited (subject to specific exceptions), as are trade-restricting or discriminatory practices by public enterprises. More recently, MERCOSUR has adopted a protocol on competition policy proscribing individual conduct or concerted agreements impeding, restricting or distorting competition or free access to markets or abusing a dominant position in a relevant regional market within MERCOSUR and affecting trade between its member States. The MERCOSUR Technical Committee on Competition Policy and Commerce Commission may issue orders to enforce these norms, which would be implemented by national agencies of the member countries, with limited supranational supervision. Common norms to control anti-competitive acts and agreements are expected to be completed soon, and national competition agencies are to adopt measures to enhance cooperation in such areas as information exchange, training and joint investigations. A dispute-settlement system has been set up. The treatment of anti-dumping within MERCOSUR is to be discussed in 2000. Decision 285 of the Commission of the Cartagena Agreement (established under the Andean Pact) also provides for the prevention of, or remedies against, distortions to competition resulting from RBPs. However, unlike MERCOSUR, Andean Pact institutions have supranational powers; member States or any enterprise with a legitimate interest may request the Board of the Cartagena Agreement for authorization to apply measures to prevent or correct the threat of injury or injury to production or exports, and which are a consequence of RBPs, and the Board's orders have direct effect in member States' legal orders. Anti-dumping action or countervailing duty action among Andean Pact countries is regulated but not precluded.

19. The North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico provides for each party to adopt or maintain measures to proscribe or take action against RBPs, to consult with the other parties on the effectiveness of such measures, and to cooperate on enforcement issues, including through mutual legal assistance, notification, consultation and the exchange of information on enforcement in the free trade area. However, detailed procedures for cooperation are not set out, and recourse to dispute settlement in competition policy matters is excluded. There are also provisions that state that monopolies or State enterprises should not operate in a manner which is inconsistent with the Agreement, nullifies or impairs its benefits, or discriminates in the sale of goods or services. A working group has been established to report on relevant issues concerning the relationship between competition law and trade polices in the free trade area. Similar provisions are contained in the free trade agreement between Canada and Chile, **with the exception of the establishment of a Working Group; * the agreement also abolishes the application of anti-dumping and countervailing duties between the parties after a transitional period (there are also competition chapters in the Canada-Israel Free Trade Agreement.** The so-called "G3 Agreement" between Mexico, Colombia and Venezuela is more limited applying only to State-owned monopolies; these are to act only on the basis of commercial considerations in operations on their own territories, and may not use their monopoly positions to use RBPs in a non-monopolized market in such a way as to affect enterprises in the other member States. A mechanism for cooperation in competition policy has now been created in the context of discussions on the establishment of a free trade area for the Americas. The communiqué adopted on 20 October 1998 at the first Antitrust Summit of the Americas, which was attended by most of the countries in the region that have competition laws, affirms that participating countries plan to cooperate with one another, in accordance with their respective laws, to improve enforcement, to disseminate best practices in this area (with the emphasis on institutional transparency), to encourage efforts by small economies in the region that do not yet have solid competition regimes to complete the development of their legal frameworks, and to advance competition principles in the Negotiating Group on Competition Policy of the Free Trade Area of the Americas.[7]

20. A similar forum for exchanges of views, technical cooperation and discussion of competition issues has been established under the auspices of the Asia-Pacific Economic Cooperation Forum (APEC), whose members have undertaken in **the APEC Principles to Enhance Competition Policy and Regulatory Reform (which is** a legally non-binding instrument) to introduce or maintain effective, adequate and transparent competition policies or laws and enforcement, to promote competition among APEC economies, and to take action in the area of deregulation. Such low-intensity cooperation contrasts with that between Australia and New Zealand, which no longer apply their anti-dumping laws to conduct affecting trade between them and instead apply their competition laws relating to predatory conduct by dominant firms (which have been harmonized). For the purpose of enforcing this, each country's competition authority and courts have "overlapping jurisdiction" - complaints may be filed before them, hearings held, and valid and enforceable subpoenas and remedial orders issued in the other country. Separately, a bilateral enforcement agreement provides for extensive investigatory assistance, the exchange of information (subject to rules on confidentiality), and coordinated enforcement.

G. Multilateral and plurilateral instruments

21. The sole universally applicable multilateral instrument in this area is the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, negotiated under the auspices of UNCTAD. The numerous instruments formulated by the Organisation for Economic Co-operation and Development (OECD) that cover competition law and policy (listed in annex 3) apply only to a restricted group of countries, although the recommendation concerning effective action against hard-core cartels states that it is open to non-OECD member countries to associate themselves with this recommendation and to implement it (and several such countries have indicated interest in associating themselves[8]; **and the recent Guidelines for Multinational Enterprises have been adopted not only by the Member countries of the OECD but also by some Latin American countries and the Slovak Republic**. The Set of Principles and Rules and the OECD instruments contain many of the types of provisions adopted in bilateral enforcement cooperation agreements and in free trade, customs union or common market agreements, but with variations, omissions or additional provisions, particularly in the case of the Set. The Set of Principles and Rules, like the OECD instruments, is concerned with the adverse impact of RBPs on international trade, but is, in addition, concerned with their impact on development. A unique feature of both the Set and the * 1978 **and 2000** OECD instruments is that they recommend not only norms to be followed by Governments, but also rules for the conduct of enterprises, with a particular focus on transnational corporations *. Both also provide for the adoption or maintenance and effective enforcement of competition laws and policies, and recommend competition norms of a general nature to be applied by member States. The Set also provides for work aimed at achieving common approaches in national policies relating to RBPs compatible with the Set (article F.1), and continued work on the elaboration of a model law or laws on RBPs in order to assist developing countries in devising appropriate legislation (article F.2); the OECD instruments do not have such provisions, but the 1998 OECD recommendation recommends convergence in (as well as effective enforcement of) laws prohibiting hard-core cartels. While the Set deals solely with RBP control, the 1986 OECD instrument is also concerned with the interface between competition policy and trade measures; it recommends that policy makers should, when considering a prospective trade measure or reviewing existing measures, evaluate their likely effects, including the impact on the structure and functioning of the relevant markets, and it suggests a checklist of the main effects of trade measures, including competition effects. The OECD has also adopted instruments dealing with competition-promoting regulatory reform.

22. The Set of Principles and Rules and the OECD instruments all provide for cooperation on enforcement, the OECD instruments having influenced or been inspired by the bilateral enforcement agreements concluded among OECD countries. The 1995 OECD recommendation (which replaces a long series of instruments recommending progressively closer cooperation) provides for notification, consultations, the exchange of non-confidential and confidential information (subject to safeguards), the coordination of investigations, investigatory assistance, traditional and positive comity, consultations and a conciliation mechanism to resolve disputes. The 1998 recommendation encourages cooperation and comity specifically in respect of enforcement against hard-core cartels, and provides for transparency and periodic reviews relating to exempted cartels. The Set also provides for consultations (envisaged both within and outside UNCTAD) and the exchange of non-confidential and confidential information. In addition, the Set contains the following provisions: States should take due

account of the extent to which the conduct of enterprises is accepted under applicable legislation (article C.6); States, particularly developed countries, should, in controlling RBPs, take into account the development, financial and trade needs of developing countries, particularly the least developed countries (article C.7); and States should seek appropriate measures to control RBPs within their competence when it comes to their attention that RBPs adversely affect international trade, particularly the trade and development of developing countries (article E.4). The Set makes no provision for dispute settlement; the Intergovernmental Group of Experts or its subsidiary organs are proscribed from acting like a tribunal or otherwise passing judgement on the activities or conduct of individual Governments or enterprises in connection with specific business transactions (article G.4). An important component of the Set not present in the OECD instruments is the provision of technical assistance to developing countries, both by countries with greater expertise in this area and by UNCTAD.

23. Unlike the Set and the above-mentioned OECD recommendations, the Uruguay Round agreements are legally binding, and are backed by strong dispute-settlement mechanisms. Different provisions with a bearing on competition law and policy are included in, *inter alia*, the articles or agreements dealing with: State enterprises and enterprises with exclusive rights; anti-dumping; subsidies; safeguards; trade-related aspects of intellectual property rights (TRIPs); trade-related aspects of investment measures (TRIMs); and trade in services, particularly telecommunications and financial services. Those provisions of a substantive character are not reviewed here in detail, as they have already been covered in a previous study by the UNCTAD secretariat.[9] Instead, an analysis is undertaken in terms of obligations relating to consultations, the exchange of non-confidential and confidential information, and positive comity. Apart from the general consultation procedures applicable to all WTO-related disputes, special consultation procedures are provided under: (a) the GATT Decision on Arrangements for Consultations on Restrictive Business Practices of 18 November 1960;[10] (b) the TRIPs Agreement, whereby a WTO member considering competition enforcement against a firm of another member can seek consultations with that member, aimed at securing compliance, while a country whose firms are subject to such action may also ask for consultations; and (c) the General Agreement on Trade in Services (GATS), in respect of certain business practices by a monopoly supplier of services and an exclusive supplier. The latter two agreements also provide for the exchange of non-confidential information and, subject to domestic laws and a satisfactory agreement concerning the safeguarding of confidentiality of confidential information. A degree of positive comity is provided for under the 1960 Decision; the party to whom a request for consultations is addressed shall, if it agrees that such harmful effects are present, take such measures as it deems appropriate to eliminate these effects. The label of positive comity might also be attached to the obligation on contracting parties under article XVII of the General Agreement on Tariffs and Trade (GATT) 1947 (now incorporated in GATT 1994) to ensure that State enterprises or private enterprises with exclusive rights act in a non-discriminatory manner in importing or exporting goods, and in particular to the GATS obligations to control certain practices by monopoly suppliers of services and exclusive service suppliers (backed by more detailed obligations in the areas of telecommunications and, to a lesser extent, financial services).

Chapter II

ENFORCEMENT COOPERATION

A. Overview

24. Enforcement cooperation has, in cases with international implications, helped to improve the quality and effectiveness of enforcement, and decrease its cost, helping to resolve difficulties in obtaining access to information held in other countries, in serving process or in undertaking enforcement against entities whose headquarters or assets are located abroad. It has also reduced friction that might arise between countries because of recourse to extraterritorial enforcement of competition laws or of jurisidictional conflicts. However, difficulties are sometimes experienced in implementing such cooperation. It takes place primarily between developed countries in the application of bilateral enforcement agreements, mutual legal assistance treaties (limited to criminal action against cartels), free trade, customs union or common market agreements, and the relevant OECD instruments. There is no evidence that FCN treaties have been utilized as vehicles for cooperation.[11] And, while the maintenance of informal links with other competition authorities has been an important way of keeping informed of developments in competition law and policy in other jurisdictions and in exchanging views, such informal cooperation has been found to be of limited usefulness where an authority requires enforcement assistance in a particular matter, or confidential information.[12] The bilateral cooperation experiences of the European Union and the United States are reviewed below; the impediments to cooperation, as well as factors conducive to cooperation, are identified; and some suggestions are made as to how developing countries might play a more prominent role in enforcement cooperation, using the frameworks provided by regional groupings and by the Set of Principles and Rules.

B. Cooperation between the European Union and the United States

25. The effect of the 1991 Agreement between the European Union and the United States was to stimulate a spirit of cooperation among the competition authorities of both jurisdictions; even though much of the cooperation undertaken in the implementation of the Agreement could have taken place before, it spurred the competition authorities concerned to "seek opportunities for cooperation in a more structured and proactive way".[13] The Agreement has been a vehicle both for exchanging information and views on enforcement policy developments, and for cooperation in individual cases. There is now routine notification of cases which concern the important interests of the other party.[14] Successive notifications may occur in the same case; in a merger case, for example, notification may be undertaken at the outset, again when the decision is taken to initiate proceedings, and again before the final decision is taken, far enough in advance to enable the other party's views to be taken into account. Where both the European Union and United States authorities undertake proceedings in respect of the same transaction, there is coordination of enforcement activities, which may involve the exchange of information and discussions on the following: the timing of their respective procedures; the delimitation of relevant markets (mainly product markets, discussions on geographical markets being limited because each authority is concentrating on effects on its own market); the anti-competitive effects of transactions; remedies that might be envisaged and the avoidance of conflict between them; and the law of, and publicly available facts in, the other jurisdiction. In one recent case, there has been successful synchronization of investigations and searches, thus avoiding the risk

of destruction of evidence in the other jurisdiction.[15] Even where these authorities take different views on certain points, such contacts have enabled them to understand each other's thinking and refine their analyses accordingly. However, in merger cases, differing deadlines for review have limited the scope for cooperation, although useful results have still been obtained.

26. The main obstacle to coordinated enforcement has been that it can often only be based on exchanges of non-confidential information **(however, a distinction is made between confidential agency information, which may be shared relatively more easily, and confidential business information, which is prohibited by law from being shared** unless the enterprises concerned have waived their objections to the exchange of confidential information ***)**. Such waivers have been granted only where it is in the interests of the enterprises to do so, and enterprises are often reluctant to allow information to be shared if it might disclose RBPs and expose them to sanctions in both jurisdictions. No waivers have so far been provided in cartel investigations. Where enterprises have been prepared to waive their objections to the exchange of confidential information, this has facilitated a successful outcome. In the Microsoft case, for instance, such a waiver enabled the European Union and United States authorities to coordinate their investigations in respect of similar practices by a dominant computer software firm in both jurisdictions, and this contributed to similar settlements being reached, despite substantive differences in competition laws.[16] However, even the exchange of non-confidential information has helped to draw attention to possible anti-competitive behaviour, improved the handling of cases and contributed to similarity in the analyses undertaken by the different authorities and the compatibility of remedies.

27. Such cooperation has not always made it possible to avoid conflicting views or to reach commonly accepted solutions, because of differences in laws, in economic doctrines, in the effects on each market, or in the evidence available in each jurisdiction. In the Upjohn/Pharmacia merger, for instance, the European Commission cleared a merger, but the United States Federal Trade Commission required the divestiture of some United States assets; similarly, the Ciba-Geigy/Sandoz merger was cleared by the European Commission, but the Federal Trade Commission, considering that the "innovation market" would be adversely affected, ordered the licensing of gene therapy rights and other technology (the concept of an "innovation market" is not used in the European Union, and there are differences in the scope of intellectual property rights in each jurisdiction).[17] On the other hand, in the Boeing/MDD case, involving the merger of two United States aircraft manufacturing companies, the Federal Trade Commission cleared the merger, but the European Commission intervened because it considered that the merger would give the companies concerned a strengthened position of dominance in the market for large aircraft. However, in this situation, traditional comity came into play to some extent; the European Commission took into account, to the extent consistent with European Union law, concerns expressed by the United States Government relating to important United States defence interests and to the undesirability of divestiture, limited the scope of its action to the civil side of the companies' operations, and approved the merger subject to a number of conditions, which did not include divestiture. As regards positive comity, it has normally been possible to take into account concerns expressed in an informal manner, with one party simply deferring its investigations while awaiting the outcome of investigations in the other jurisdiction, being kept informed of progress and being provided with the opportunity to comment on the proposed remedy. This happened, for example, in the A.C. Nielsen case (involving abuses of dominance in the contracting practices by a United States firm providing

retail tracking services, which may have been adversely affecting exports to Europe by its competitors based in the United States).[18] Positive comity procedures have so far only been formally activated once; the United States Department of Justice has asked the European Commission to investigate allegations that a computerized reservation system set up by three European airlines was operated in an anti-competitive manner to prevent computerized reservation systems based in the United States from competing in European markets; the case is under investigation by the European Commission in cooperation with the Department of Justice. Dissatisfaction has been expressed by some members of the United States Congress with the operation of positive comity, because it is considered not to have led to improved market access for United States exports so far; United States business people have also alleged that there have been delays in investigations by the European Commission, that there are insufficient powers to compel the discovery of documents, and that evidentiary standards are too high. However, the Department of Justice has expressed confidence in the quality of European Union enforcement, and has stated that positive comity will need time to work, even if it may not have immediate success, and is better than the alternative.[19] The Federal Trade Commission has also stated that disagreements are the exception rather than the rule, and that there is a "slow but steady convergence of review and mutual respect" between the United States and European Union.[20]

C. Impediments and factors conducive to cooperation

28. As appears from the above, cooperation is facilitated by a degree of commonality of approach; differences in substantive competition laws or doctrines, enforcement practices or procedures, or interpretations of the underlying facts may all constitute impediments. Differences in legal doctrines relating to extraterritoriality may also adversely affect cooperation; while the strengthening of cooperation between the European Union and the United States may have been facilitated by the assertion by the European Union of jurisdiction based on "objective" territoriality[21] (which has some similarities with extraterritorial jurisdiction based upon the "effects doctrine" asserted by the United States), substantial differences still persist,[22] and the view has been expressed that the fundamental objection of the United Kingdom Government, and many others, to the extraterritorial enforcement of United States antitrust law has significantly limited the cooperation possible.[23] Cooperation may also be limited by concerns about having enforcement priorities and resource allocation determined by positive comity requests from other countries, or **about** exposing national firms to sanctions by a foreign authority **or court (including, where applicable, orders of United States courts for payment of treble damages in private suits following on from action by enforcement agencies).**[24] * Reciprocity would also be a concern. As noted in chapter I, it is a requirement, for instance, under the provisions of the United States International Antitrust Enforcement Assistance Act of 1994. **Under the Canadian Competition Act, the Competition Bureau has the authority to communicate confidential information to a foreign competition authority where doing so would advance the Canadian case (which would include a joint Canadian/foreign case). Most often, this would occur where the foreign authority would be able to provide the Bureau with information or other assistance in return. The Bureau does not have the authority to communicate confidential information solely to advance a foreign case of a civil nature. It does have such authority in criminal antitrust cases falling under a Mutual Legal Assistance Treaty (however, such treaties do not cover conduct which would not be treated as criminal under Canadian law).** The German * **Monopolies Commission (which is an independent body with advisory status) has proposed** that reciprocity and the

"earmarking" of confidential information, as well as the justified interests of the companies concerned, should be taken into account in concluding cooperation agreements and that such agreements might initially be limited to those countries that have secrecy regulations themselves, guarantee the implementation of those regulations and choose to cooperate.[25] Cooperation may also be hampered by perceptions of national industrial or trade policies influencing competition decisions, or inspiring leakage of confidential information - a senior official of the European Union has suggested that a lesson from the Boeing case is that successful cooperation depends on rigorous economic analysis based on strictly legal rules, and that issues of trade policy should not be allowed to become entwined with competition issues when scrutinizing transactions,[26] while a senior official from the Department of Justice, discussing enforcement against international cartels, has stated that the greatest impediment to cooperation is the fear, or the suspicion, that evidence will be used for trade purposes.[27] While the trend towards greater convergence in this area[28] may help to reduce such considerations and concerns, they will not disappear, since what may maximize welfare in one country may reduce it in another.

29. Competition law and policy have also been linked more directly to trade issues. A version of positive comity (in terms of competition advocacy rather than enforcement) has operated with some success on an informal level between the United States and other countries. First within the context of the Structural Impediments Initiative in 1989, and then through the Deregulation and Competition Policy Working Group set up under the Framework for a New Economic Partnership in 1993, the United States has strongly encouraged a more stringent competition policy in Japan, especially in instances where it perceived anti-competitive activity as impeding competition from foreign products.[29] Similar initiatives have been taken through the Competition Policy Working Group set up within the context of the Dialogue for Economic Cooperation between the United States and the Republic of Korea. As a result, the Republic of Korea decided to strengthen its competition law and enforcement, apply competition principles in deregulation, improve access to television and radio advertising slots, address RBPs by industry associations and revise regulations and guidelines that might impede pro-competitive activities.[30] In a recent case, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes was invoked by the United States in relation to alleged Japanese measures affecting the distribution and sale of imported consumer photographic film and paper (contrary to GATT 1994), as well as a number of measures allegedly affecting distribution services in general (contrary to GATS); consultations were also requested by both the United States and Japan, in pursuance of the 1960 GATT Decision, in respect of alleged RBPs affecting imports of photographic film and paper into each other's markets (the European Union also asked to join in these consultations). The procedures under GATS and the 1960 Decision were suspended, while the complaint under GATT 1994 was rejected by the Dispute Settlement Panel.[31]

30. It is therefore likely that countries will be prepared to cooperate voluntarily only if there is a shared perception of common interest and mutual benefit. This may be one reason why enforcement cooperation agreements leave such a large measure of discretion to the parties as to whether or not to cooperate in individual cases. It may also help to explain why some free trade agreements exclude competition law and policy issues from the purview of dispute settlement, and why the conciliation machinery provided for in successive OECD recommendations on this subject has not so far been resorted to (although, in 1987, the OECD Committee of Experts on Restrictive Business Practices took the view that this was mainly because the notification,

exchange of information and consultation procedures provided for had been effective in avoiding or resolving conflicts).[32] The difficulty of enforcing these agreements may in fact facilitate their conclusion, and the potential impediments to cooperation identified above would be weighed against the benefits from the conclusion or further development of enforcement cooperation agreements. Thus, a senior official of the European Commission has called for the conclusion of "second-generation" cooperation agreements making it possible to share confidential information and use compulsory process on behalf of other countries; this official does not accept that concerns relating to differences between competition rules and to risks that confidential information might be used in a way which harms European interests should prevent this, as the experiences of existing cooperation between the European Union and the United States show that the views of the parties are more often likely to coincide than to differ, as differences between rules are less important in the case of the most serious infringements (particularly in the case of hard-core cartels and the most serious abuses of dominance) and as discrepancies between rules in other areas have not precluded effective cooperation.[33] The same official has expressed the view that a key ingredient in successful enforcement cooperation is mutual confidence in enforcement capabilities and in respect for confidentiality, arising from a shared commitment to upholding the competitive process.[34] Building up such mutual confidence requires a progressive approach. It has been suggested that after starting with a simple cooperation agreement, countries could evolve to more complex agreements involving the exchange of confidential information as confidence and a tradition of cooperation is built up, increasing the level of both obligation and mutual benefit, and that the extent and intensity of cooperation would depend on institutional capabilities, the actual experience of cooperation and the degree of trust built up over time.[35] Even agreements which might not be regarded as optimal by all parties may pave the way for further agreements. For instance, before the 1997 Agreement between the United States and Australia was concluded, the view was expressed that the 1982 Agreement between the two countries was one-sided, but that the experience of its implementation had provided a more conducive environment for expanding cooperation.[36] For the purpose of strengthening enforcement cooperation, it has been suggested that developing common standards is important, and that a balance between transparency and the protection of confidential information should be found, as an international consensus on the latter would facilitate the conclusion of agreements featuring close cooperation between enforcement authorities.[37] **But it has also been suggested that a broader limitation to bilateral cooperation is that it tends to take place among countries which are economically interdependent and share a similar level of experience in competition law enforcement, or the same ideas on competition policy.**[38]

D. Developing countries, regional groupings and the Set of Principles and Rules

31. Developing countries have not so far * participated **to any great extent** in **intensive case-specific** enforcement cooperation. In the *French/West African Shipowners' Committees*[39] case, for instance, the European Commission brought a case against cartels or exclusionary abuses by liner conferences or shipowners' committees with dominant positions in the maritime traffic between Europe and 11 West and Central African States. In its decision, which had pro-competitive effects in the countries concerned,[40] the Commission indicated that it was ready to enter into talks with the authorities of these countries with a view to helping their carriers secure a greater share of the traffic generated by their external trade. However, it appears that,

prior to taking its decision, the Commission had not consulted with the African countries concerned, most of which did not have functioning competition laws or institutions at that time, and whose shipping authorities had in fact authorized cargo reservations by the shipping companies concerned. The circumstances were similar in the *CEWAL Liner Conference* case, involving traffic to Angola and the Congo.[41] Enforcement cooperation between the European Union and the countries concerned might not only have led to traditional comity coming into play, but might also have facilitated data-gathering by the Commission (it took five years for the Commission to take a decision in the *Shipowners* case). **However, developing countries' competition authorities now sometimes participate in exchanges of general information, and some case-specific technical assistance has occasionally been provided; for example, the Kenyan Monopolies and Prices Commission provided consultancy services to the Zambian Competition Commission in respect of a beer sector case in Zambia.**[42] To the extent that enforcement cooperation is not strengthened, there is also a higher risk that, as developing countries become more active in this area, firms will have to deal with the procedures and possibly inconsistent orders of several jurisdictions - as happened in the *Gillette/Wilkinson* case (where a proposed merger was examined in 14 jurisdictions, including Brazil and South Africa).[43] Conversely, assistance with information-gathering and enforcement in relation to RBPs originating overseas and affecting their markets would be a major potential benefit for developing countries entering into enforcement cooperation agreements - for example, in two cases in the United States where international cartels for lysine (an ingredient in animal feed) and citric acid were successfully prosecuted, the Department of Justice discovered evidence of price-fixing and market allocation relevant to other countries, but could not share such evidence with those countries which were not party to antitrust cooperation agreements with the United States.[44]

32. The time is now ripe for change. The majority of developing countries have adopted or are in the process of drafting competition laws, and this trend is continuing. Fully effective implementation of all such competition laws will take time, depending on a gradual learning process, but progress is being made. The initiation and progressive practice of enforcement cooperation would both enhance effective implementation of competition laws and prepare the ground for more advanced cooperation. Enforcement cooperation among developing countries with limited experience in this area, but facing similar circumstances, may be of a more balanced character than cooperation with countries with more experience in this area, and would also constitute a learning experience, ensuring that cooperation with more advanced partners is fruitful.

33. While the eventual conclusion of bilateral enforcement cooperation agreements would be necessary for full cooperation to take place, enforcement cooperation might initially take place on an informal basis. This would be facilitated by the initiation of informal discussions and exchanges of general information, including within the framework of any free trade, customs union or common market agreements to which the countries concerned are party. Within regional or subregional groupings, political will or relative uniformity of economic development and culture may make it easier to build up mutual trust and perception of common interests (which may be looked at within the context of the overall relationship rather than just in terms of competition law and policy).

34. There is little evidence that developing countries party to such agreements have so far taken advantage of them either to undertake enforcement cooperation or to prepare the ground for it. Direct use of free trade or common market agreements for enforcement cooperation appears so far to have taken place only within the European Union or the EEA, but they have in other cases provided a framework conducive to bilateral cooperation. Within NAFTA, for example, the Working Group on Competition **and Trade** has so far focused on studying members' competition laws, as well as transborder cases. **It has now essentially completed its work, but competition and trade officials still meet to continue, among other objectives, to explore the possibility of formal cooperation arrangements.** The Mexican competition authority has also had extensive bilateral consultations with the Canadian and United States authorities on technical aspects of applying competition law and on specific cases, including cases involving RBPs with a transborder dimension (cases with implications for other member countries are notified).[45] Even within regional groupings, however, enforcement cooperation may be limited by some of the concerns and differences highlighted above, by the fact that regional institutions or mechanisms are not adapted for enforcement cooperation, or simply because trade is limited between some countries in the grouping or RBPs affecting such trade are rare. It is therefore likely that, at least initially, cooperation will develop in an asymmetrical manner among different member countries within regional groupings. Within MERCOSUR, for instance, **it has been suggested that** there may be little incentive to open and conduct investigations when trade interests are involved, given the relative institutional weights of the regional Committee for the Defence of Competition and the Commerce Commission; it has also been suggested that problems may arise from ambiguities in the definitions of RBPs and in institutional mandates, as well as from asymmetries among member States in terms of the adoption and implementation of competition laws.[46] While several agreements between competition authorities of MERCOSUR member States have been concluded, providing for procedures for reciprocal consultations and technical assistance, linkages have so far been generated mainly between the Argentine and Brazilian authorities, helping to unify criteria applied by the two authorities.[47] Within the Andean Pact, it has been suggested that the requirements for proving RBPs within the definitions provided in Decision 285, as well as the lack of enforcement power of the Andean Board, explain why Andean Pact competition legislation and case law have not developed as fast as that of member countries.[48] **Consideration is now being given to the amendment of Decision 285.**

35. To realize the potential of regional groupings in this respect, therefore, some reflection would be appropriate as to which substantive competition regimes, institutional structures and mechanisms would promote cooperation. For this purpose, consultations might be undertaken within UNCTAD on how to maximize utilization of regional frameworks for enforcement cooperation. This would be in line with the Set of Principles and Rules, which provides for the establishment of appropriate mechanisms at the regional and subregional levels to promote the exchange of information on RBPs and on the application of national laws and policies in this area, and to provide mutual assistance in RBP control (article E.7). The framework established under the Set might also be used more directly to further enforcement cooperation. So far, the consultation mechanisms provided for in the Set have mostly been used, with success, for presentations, the exchange of experiences and discussions on different competition issues. In one case in the mid-1980s, a developing country, using the UNCTAD secretariat as an intermediary, requested consultations with a developed country regarding the prohibition by one of its pharmaceutical firms of exports from a neighbouring developing country of

pharmaceuticals manufactured under a licence granted by the firm. The matter was referred by the authorities of the developed country to the firm in question, and its reply explaining the circumstances of the prohibition was transmitted to the developing country (the matter was brought to the attention of the Intergovernmental Group of Experts on Restrictive Business Practices during informal consultations). It might be worth exploring the potential for further case-specific consultations of this type, which might be stimulated by a practice of notification of enforcement activities affecting the important interests of other States party to the Set **to the States concerned**. The aim would be to reinforce or promote cooperation under bilateral or regional agreements, rather than to replace such cooperation, since enforcement cooperation under non-binding OECD instruments tends to be less intensive and case-oriented if not backed up by a binding bilateral agreement.[49]

36. Such case-specific enforcement cooperation would not be at the expense of other forms of cooperation, but would rather aim to link with and build on them in a synergistic manner. There are extensive contacts among competition authorities for the purpose of exchanging general information, experiences or ideas; such contacts take place either on an informal basis or in pursuance of bilateral or regional agreements, as well as under the Set of Principles and Rules and under OECD instruments.[50] Substantial technical assistance also takes place, in the form of seminars and training courses; visits to, or training attachments with, competition authorities in developed countries; short-term missions to countries needing cooperation, including analyses of their situation and needs, workshops, group training, assistance on particular issues or in the drafting of legislation; and long-term secondments of personnel from authorities with experience in this area for the purposes of training and giving advice to the authorities of countries with limited experience. The European Commission, for example, has arranged study visits and responded to numerous requests for information from several competition authorities, and has assisted in the preparation of a compendium of Latin American competition laws, a list of national authorities, the joint publication of a Latin American competition bulletin (posted on the Internet), a list of the technical cooperation needs of many Latin American countries and subregional organizations, and a proposed biennial programme of technical assistance for MERCOSUR that includes a section on competition.[51] To the extent that the communication of experiences or provision of technical assistance by one or more countries induces other countries to adopt or amend competition legislation or modify enforcement policies or procedures along similar lines, this promotes "soft" convergence (in contrast to the varying degrees of convergence or harmonization provided for in this area by free trade, customs union or common market agreements). It has been suggested that "one advantage of convergence by learning and imitation is its flexibility; if a particular approach does not work out in the circumstances of a country's economic system, it can be modified or even abandoned".[52]

37. Yet, as indicated above, some degree of commonality is necessary in this area for enforcement cooperation to be successful, and there is a risk in particular of some lack of coherence among national competition regimes, and between national and different levels of regional competition regimes. A study on CEMAC, for instance, highlights such impediments to the implementation of a regional competition policy as the inadequate implementation of competition laws at the national level (in those member countries which have such laws), and the lack of compatibility between the objectives of these laws and the proposed regional regulation on competition policy.[53] It therefore suggests the establishment within the CEMAC secretariat of a special consultation mechanism to manage the transition to the entry into force of the

regulation, to be eventually replaced by a regional competition board, which would focus on investigating and analysing those RBPs which hamper the development of trade within the subregion (in the transport sector for instance). It also recommends that efforts should be made to ensure compatibility between the proposed CEMAC regulations and national sectoral policies (including structural adjustment policies agreed upon with international financial institutions), the uniform act to be adopted under the Treaty on the Harmonization of Business Law in Africa (some of the member States of the Organization for the Harmonization of Business Law in Africa are signatories of CEMAC), and the provisions of the treaty to replace the Lomé Convention. Regarding these recommendations, it might be noted that any provisions relating to competition policy within African or Caribbean subregional groupings, or in a post-Lomé treaty, would presumably (as in the Euro-Mediterranean agreements) apply only to practices affecting trade within or between regions, and not to practices having effects solely within national borders. Within the European Union itself, some countries have maintained national competition regimes significantly different from that of the European Union (Italy, for instance, did not even have a competition law until 1990), although the trend is towards convergence. Nevertheless, as indicated in chapter I, there is no hard and fast line between practices affecting individual countries and those affecting a region, and it may not be easy for ACP countries which have little experience in this area to maintain separate regimes for national, subregional and interregional transactions. Nor might this be conducive to trade or direct foreign investment. Thus, it may be appropriate to undertake consultations within UNCTAD on how to ensure compatibility, coexistence and mutual reinforcement among national, subregional and interregional competition regimes. This would involve discussing how much convergence * **among substantive, procedural and enforcement policy aspects of** competition laws and policies is necessary to further enforcement cooperation, and what the appropriate balance would be between promoting such convergence and allowing room for diversity and experimentation by each country or subregional grouping to work out what is appropriate for its needs. It may be noted in this connection that the competition authorities of Gabon, which is a signatory to the CEMAC treaty, have suggested that UNCTAD might help to ensure the conformity of the practices of regional and subregional States with competition principles. Such consultations could provide a useful input to the ongoing discussions or possible future negotiations within WTO on the interaction between trade and competition policy. **It may also be noted that a high-level advisory body has recommended that the United States explore the scope for collaboration among interested Governments and international organizations to create a new forum (called the "Global Competition Initiative") for fostering dialogue directed towards greater convergence of competition law and analysis, common understandings and common culture.**[54]

Notes

[1] See paragraph 5 (c) of the agreed conclusions in annex I of the Report of the Expert Meeting on Competition Law and Policy (TD/B/COM.2/9-TD/B/COM.2/EM/12).

[2] See paragraph 7 (a) of the Agreed Conclusions in annex I of the Report of the Intergovernmental Group of Experts on Competition Law and Policy (TD/B/COM.2/13-TD/B/COM.2/CLP/5).

[3] **Written comments on the question of international cooperation on competition law and policy have been received from the Governments of Brazil, Canada, Finland, Hungary, Japan, Kenya, Malta, New Zealand, Peru, Poland, Romania, the Slovak Republic, Slovenia, the United Republic of Tanzania and the United States, as well as from the secretariat of the Andean Community.**

[4] **See International Competition Policy Advisory Committee to the Attorney-General and Assistant Attorney-General for Antitrust, "Final Report", United States Department of Justice, 2000.**

[5] This categorization follows to some extent that adopted in World Trade Organization, *Annual Report 1997*, vol. 1, *Special Topic: Trade and Competition Policy*.

[6] See Price Waterhouse Fidafrica, *Le nouveau droit des affaires en Afrique - OHADA*, Paris, 1997.

[7] See "FTC and DOJ publish communiqué from first "Antitrust summit of the Americas", *Antitrust & Trade Regulation Report*, 8 October 1998, vol. 75, p. 416.

[8] See WTO Working Group on the Interaction between Trade and Competition, "Policy report on the meeting of 11-13 March 1998" (WT/WGTCP/M/4), paragraph 57.

[9] "The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round agreements relevant to competition policy, including their implications for developing and other countries" (TD/RBP/COM.2/EM/2). See also the WTO *Annual Report 1997*, op. cit.

[10] Now incorporated in GATT 1994.

[11] See OECD, "History and potential benefits of positive comity" (DAFFE/CLP/WP3(98)3).

[12] See H. Spier and T. Grimwalde, "International engagement in competition law enforcement: the future for Australia", *Trade Practices Law Journal* 5 (1997), p. 232.

[13] See WTO Working Group on the Interaction between Trade and Competition Policy, "Submission from the United States" (WT/WGTCP/W/48).

[14] See Commission of the European Communities, "Commission report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws - 1 January 1997 to 31 December 1997", Brussels, 11 May 1998.

[15] Ibid.

[16] Reported in UNCTAD, "Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases" (TD/RBP/CONF.4/6).

[17] See WT/WGTCP/W/48, op. cit.

[18] See also "Consorzio del Prosciutto de San Daniele - Consorzio del Prosciutto di Parmi" (Rif. 1138, Delibera del 19.06.96 - Boll. N. 25/1996) (production quotas maintained by Parma ham producers in Italy; the Federal Trade Commission deferred enforcement action to the Italian competition authority).

[19] See "Klein, Pitofsky, business leaders brief senators on pitfalls of foreign enforcement", *Antitrust & Trade Regulation Report* 75, 8 October 1998, p. 417.

[20] See "FTC Chairman discusses competition policy trends in international antitrust enforcement", *Antitrust & Trade Regulation Report* 75, 12 November 1998, p. 555.

[21] See *Ahlstrom et al. v. European Commission* (1988) ECR 5193 (1988) 4 C.M.L.R. 901, and WT/WGTCP/W/48, op. cit.

[22] See TD/B/COM.2/EM/2, op. cit.

[23] See M. Bloom, "International cooperation between competition authorities", speech to the Law Society's Solicitors' European Group Annual Conference, Bristol, 13 June 1997, p. 5, cited in OECD, op. cit.

[24] **See OECD, "Trade and Competition Policies - Exploring the Ways Forward", p. 19.**

[25] See German Monopolies Commission, *The Twelfth Biennial Report 1996/1997: Opening up Markets Extensively*, Nomos Verlagsgesellschaft, Baden-Baden, 1998.

[26] Ibid.

[27] See "A note of caution with respect to a WTO agenda on competition policy", address by Joel L. Klein, Acting Assistant Attorney-General, United States Department of Justice, to the Royal Institute of International Affairs, London, 18 November 1996.

[28] See UNCTAD, "The basic objectives and main provisions of competition laws and policies" (UNCTAD/ITD/15) and TD/B/COM.2/EM/2, op. cit.

[29] See WTO Working Group on the Interaction between Trade and Competition Policy, "Communication from the United States - The impact of regulatory practices, State monopolies, and exclusive rights on competition and international trade" (WT/WGTCP/W/83).

[30] Ibid.

[31] "Japan - Measures affecting Consumer Photographic Film and Paper" (WT/DS44/R, 31 March 1998).

[32] See OECD, *Competition Policy and International Trade: Instruments of Cooperation*, Paris, 1987.

[33] See A. Schaub, "International cooperation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings", *EC Competition Policy Newsletter*, No. 1 (1998), p. 2.

[34] See Schaub, op. cit.

[35] See statements by the representatives of Brazil, Canada and the United States in WTO Working Group on the Interaction between Trade and Competition Policy, "Report on the meeting of 11-13 March 1998" (WT/WGTCP/M/74, paras. 41, 54 and 55).

[36] See Spier and Grimwalde, op. cit.

[37] See the statement by the representative of Brazil in paragraph 55 of WT/WGTCP/M/74, op. cit.

[38] **See WTO, "Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council" (WT/WGTCP/3), para. 44.**

[39] Reported in TD/RBP/CONF.4/6, op. cit.

[40] See Y. Kenfack, "La politique de la concurrence dans les transports maritimes internationaux: enjeux pour les pays en développement", study prepared for the UNCTAD secretariat.

[41] See TD/RBP/CONF.4/6, op. cit.

[42] **Information provided by the Kenyan competition authority.**

[43] Ibid.

[44] See "A note of caution with respect to a WTO agenda on competition policy", address by Joel L. Klein, Acting Assistant Attorney-General, United States Department of Justice, to the Royal Institute of International Affairs, Chatham House, London, 18 November 1996.

[45] Communication by the Mexican authorities to the Secretary-General of UNCTAD. See also WTO Working Group on the Interaction between Trade and Competition Policy, "Report of the meeting of 27 and 28 November 1997" (WT/WGTCP/M/3, statement of the representative of Mexico in paragraph 65).

[46] See G. Castañeda, "Mexico: competition policy and economic integration in NAFTA and MERCOSUR", *International Business Lawyer* 26 (1998), p. 496; **and J. Tavares de Araujo and L. Tineo, "Harmonization of competition policies among MERCOSUR countries", *The Antitrust Bulletin* XLIII (1998), p. 45.**

[47] See the statement by the representative of Argentina in paragraph 53 of WT/WGTCP/M/4, op. cit.

[48] See B. Ciuffetelli, "Role of antitrust law in Latin American integration", *International Business Lawyer* 26 (1998), p. 522.

[49] See Schaub, op. cit.

[50] For information on the intensive exchanges taking place within the OECD, see WTO Working Group on the Interaction between Trade and Competition Policy, "Communication from OECD" (WT/WGTCP/W/21).

[51] See European Commission, *XXVIIth Report on Competition Policy 1997*, Brussels-Luxembourg, 1998.

[52] WTO Working Group on the Interaction between Trade and Competition Policy, "Report on the meeting of 11-13 March 1998" (WT/WGTCP/M/4), paragraph 52.

[53] See Y. Kenfack, "Réglementation communautaire de la concurrence et renforcement du processus d'intégration économique en Afrique Centrale", study prepared for the UNCTAD secretariat.

[54] **See International Competition Policy Advisory Committee, op. cit.**

ANNEX 1

BILATERAL AGREEMENTS ON COMPETITION LAW ENFORCEMENT

Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany relating to Mutual Cooperation regarding Restrictive Business Practices (Bonn, 23 June 1976).

Agreement between the Government of the United States of America and the Government of Australia relating to Cooperation on Antitrust Matters (Washington, D.C., 29 June 1982).

Agreement of the Federal Republic of Germany and the Government of the French Republic concerning Cooperation on Restrictive Business Practices (28 May 1984).

Agreement between the Government of the United States of America and the Commission of the European Communities on the Application of Their Competition Laws (23 September 1991; entry into force, 10 April 1995).

Cooperation and Coordination Agreement between the Australian Trade Practices Commission and the New Zealand Commerce Commission (July 1994).

Agreement between the Government of the United States of America and the Government of Canada regarding the Application of Their Competition and Deceptive Marketing Practices Laws (Washington, D.C., 1 August 1995 and Ottawa, 3 August 1995).

Agreement between the United States of America and Australia on Mutual Antitrust Enforcement (1997).

Agreement between the Government of the United States of America and the Commission of the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws (4 June 1998).

Canada-European Communities Agreement Regarding the Application of their Competition Laws (29 April 1999).

Agreement between the Government of Japan and the Government of the United States of America concerning Cooperation on Anticompetitive Activities (7 October 1999).

Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil regarding Cooperation between their Competition Authorities in the Enforcement of their Competition Laws.

ANNEX 2

SELECTED FREE TRADE, CUSTOMS UNION OR COMMON MARKET AGREEMENTS WITH COMPETITION LAW AND POLICY PROVISIONS

Treaty Establishing the European Coal and Steel Community (Paris, 18 April 1951).

Treaty Establishing the European Economic Community (Rome, 25 March 1957).

Convention establishing the European Free Trade Association (Stockholm, 4 January 1960).

Association Agreement between the European Economic Community and Turkey (1961), with Decision No. 1/95 of the European Union-Turkey Association Council on Implementing the Final Phase of the Customs Union (22 December 1995).

Treaty Establishing the Central African Customs and Economic Union (Brazzaville, December 1964).

Andean Subregional Integration Agreement (Cartagena, 26 May 1969), together with Decision 285 of the Andean Commission, "Norms to prevent or correct competitive distortions caused by practices that restrict free competition" (21 March 1991).

Treaty Establishing the Caribbean Community (Chaguaramas, 4 July 1973; entry into force, 1 August 1973).

Australia-New Zealand Closer Economic Relations Agreement (entry into force, 1 January 1983), with the Protocol on the Acceleration of Free Trade in Goods (1988; entry into force, 1 July 1990), and the Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Harmonization of Business Law (1 July 1988).

Southern Agreement Common Market (Asunción, 26 March 1991), together with Decision 17/96 containing the Protocol on the Defence of Competition (17 December 1996).

Treaty Establishing the Southern African Development Community (Windhoek, 17 August 1992), together with the Protocol on Trade (August 1996).

North American Free Trade Agreement between the Government of the United States of America, the Canadian Government and the Government of the United States of Mexico (Washington, D.C., 8 and 17 December 1992; Ottawa, 11 and 17 December 1992; and Mexico City, 14 and 17 December 1992).

Central European Free Trade Agreement (entry into force, 1 March 1993).

Commonwealth of Independent States Treaty on Economic Union (Moscow, 24 September 1993).

Treaty on the Harmonization of Business Law in Africa (Port Louis, 17 October 1993).

Treaty Establishing the Common Market for Eastern and Southern Africa (Kampala, 5 November 1993).

Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Kingdom of Sweden (13 December 1993; entry into force, 1 January 1994).

Treaty Establishing the Central African Economic and Monetary Community (N'Djamena, 16 March 1994).

Europe agreements between the European Communities and their member States, of the one part, and, respectively: the Republics of Hungary and Poland, of the other part (Brussels, 16 December 1991; entry into force, 1 February 1994); the Republics of Bulgaria and Romania (entry into force, 1 February 1995); the Republics of Estonia, Latvia and Lithuania (12 June 1995); and Slovakia and Slovenia (15 June 1995).

Europe agreements establishing an association between the European Communities and their member States, of the one part, and, respectively, the Czech Republic, the Slovak Republic and Romania (entry into force, 1 February 1995).

Agreements on free trade and trade-related matters between the European Community, the European Coal and Steel Community, and the European Atomic Energy Community, of the one part, and, respectively: the Republics of Estonia, Latvia and Lithuania (12 June 1995); and the Republics of Slovakia and Slovenia (15 June 1995).

Agreements on partnership and cooperation between the European Community, the European Coal and Steel Community and the European Atomic Energy Committee, of the one part, and, respectively: Ukraine (14 June 1994); the Russian Federation (24 June 1994); the Republic of Kazakhstan (23 January 1995); the Kyrgyz Republic (9 February 1995); the Republic of Moldova (28 November 1994); and the Republic of Belarus (6 March 1995).

Osaka Action Agenda, 1995, adopted by the Asia-Pacific Economic Cooperation forum (APEC).

Euro-Mediterranean agreements establishing an association between the European Communities and their member States, of the one part, and, respectively: the State of Israel, of the other part (Brussels, 22 November 1995); the Kingdom of Morocco (30 January 1996); the Republic of Tunisia (17 July 1996); the Palestinian Authority (2 June 1997); and Jordan (24 November 1997).

Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its Member States, adopted at Cotonou, Benin, on 23 June 2000.

Framework cooperation agreement leading ultimately to the establishment of a political and economic association between the European Community and its member States, of the one part, and the Republic of Chile, of the other part (Florence, 21 June 1996).

Canada/Chile Free Trade Agreement (Ottawa, 14 November 1996; entry into force, 1 June 1997).

ANNEX 3

MULTILATERAL AND PLURILATERAL INSTRUMENTS DEALING WITH COMPETITION LAW AND POLICY

*

Recommendation of the OECD Council on restrictive business practices affecting international trade, including those involving multinational corporations (20 July 1978).

The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, adopted by General Assembly resolution 35/63 of 5 December 1980.

Recommendation of the OECD Council for cooperation between member countries in areas of potential conflict between competition and trade polices (C(86)65(Final), 23 October 1986).

Recommendation of the OECD Council, "minimizing conflicting requirements: approaches of moderation and restraint" (1987).

Final Act of the Uruguay Round of Multilateral Trade Negotiations (Marrakech, April 1994).

Revised recommendation of the OECD Council concerning cooperation between member countries on anti-competitive practices affecting international trade (27 and 28 July 1995 (C(95)130/FINAL)).

Recommendation of the OECD Council concerning effective action against hard-core cartels.

WTO Agreement on Basic Telecommunications Services (15 February 1997; entry into force, 1 January 1998).

OECD Guidelines for Multinational Enterprises, adopted by the Governments of the 29 Member countries of the OECD and of Argentina, Brazil, Chile and Slovakia at the OECD Ministerial Meeting on 27 June 2000.

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PRINCIPLES AND RULES FOR THE CONTROL
OF RESTRICTIVE BUSINESS PRACTICES
Geneva, 25 September 2000
Item 8(a) of the provisional agenda

EXPERIENCES GAINED SO FAR ON INTERNATIONAL COOPERATION ON COMPETITION POLICY ISSUES AND THE MECHANISMS USED

CORRIGENDUM ISSUED AT THE REQUEST OF CANADA

In paragraph 19 of the report TD/RBP/CONF.5/4, line 13 onwards, delete "**the agreement also abolishes the application of anti-dumping and countervailing duties between the parties after a transitional period (there are also competition chapters in the Canada-Israel Free Trade Agreement)**", and insert "**There is also a competition chapter in the Canada-Israel Free Trade Agreement.**"

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Item 6 (b) of the provisional agenda

REVIEW OF TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON COMPETITION LAW AND POLICY

Note by the UNCTAD secretariat

Summary

UNCTAD provides various types of technical assistance and advisory and training programmes on competition law and policy to developing countries and countries in transition in accordance with requests received, needs of countries concerned and resources available. Accordingly, the document contains a progress report on technical cooperation activities of the UNCTAD secretariat, which are described under the three main subheadings, namely national activities, regional and subregional activities, and participation in seminars and conferences. The document also contains extracts from replies of member States and international organizations to the note by the Secretary-General of UNCTAD requesting information on technical cooperation activities provided, planned or received, bilaterally or multilaterally, in the area of competition law and policy. Extracts from replies received, which are related to requests for technical assistance with identification of specific competition law and policy areas or issues which the States or international organizations would wish to see receive priority attention, are presented as a separate subsection.

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I. INTRODUCTION

1. It is recalled that section F, paragraphs 6 and 7, of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted by the United Nations General Assembly in 1980 (TD/RBP/CONF.10/Rev.1) calls for technical assistance, and advisory and training programmes on restrictive business practices, particularly for developing countries. The Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in paragraph 4 of its resolution (TD/RBP/CONF.4/5, Annex I), requested the UNCTAD secretariat, "taking into account increased needs for technical cooperation and technical assistance in developing countries, countries in transition and other countries, to carry out a review of technical cooperation activities undertaken by UNCTAD and other international organizations, as well as States bilaterally, with a view to strengthening its ability to provide technical assistance for capacity-building in the area of competition law and policy by:

(a) Encouraging providers and recipients of technical cooperation to take into account the results of the substantive work done by UNCTAD in the above-mentioned areas in determining the focus of their cooperation activities;

(b) Encouraging developing countries and countries in transition to identify specific competition law and policy areas and issues which they would wish to see receive priority attention in the implementation of technical cooperation activities;

(c) Identifying common problems encountered in the competition law and policy area which might receive attention in regional and subregional seminars;

(d) Enhancing cost-effectiveness, complementarity and collaboration among providers and recipients of technical cooperation, both in terms of the geographical focus of technical cooperation activities, taking into account the special needs of African countries, and the nature of cooperation undertaken;

(e) Preparation and execution of national, regional and subregional projects on technical cooperation and training in the field of competition law and policy, taking special account of those countries or subregions which have not received such assistance so far, especially in the field of law drafting and staff training, and enforcement capacity;

(f) Mobilizing resources and widening the search for potential donors for UNCTAD technical cooperation in this area;".

2. Subsequently, in the agreed conclusions of its second session, the Intergovernmental Group of Experts on Competition Law and Policy (June 1999) took note with appreciation of the voluntary financial and other contributions received from member States and invited all member States to assist UNCTAD on a voluntary basis in its technical cooperation activities by providing experts, training facilities or financial resources; requested the UNCTAD secretariat to pursue its technical cooperation activities within the available resources; and invited the Secretary-General of UNCTAD to explore the feasibility of supporting training and capacity-building on a regional basis within the available resources. It further requested the UNCTAD secretariat to prepare for

consideration by the Fourth Review Conference an updated review of technical assistance, taking into account the information to be submitted by member States and international organizations no later than 31 January 2000 (TD/B/COM.2/19; TD/B/COM.2/CLP/14).

3. Accordingly, this note contains information on technical cooperation activities of the UNCTAD secretariat in the period shortly before and after the second session of the Intergovernmental Group of Experts on Competition Law and Policy, held from 7 to 9 June 1999, as well as extracts from replies of member States and international organizations to the note by the Secretary-General of UNCTAD requesting information on technical cooperation activities in the field of competition law and policy (TDN 915(1) of 22 November 1999). The Secretary-General is grateful for the replies to his note.

II. PROGRESS REPORT ON UNCTAD TECHNICAL COOPERATION

4. It should be noted that UNCTAD provides assistance and advisory and training programmes on competition law and policy to developing countries and countries in transition in accordance with requests received and resources available. The main types of requests for technical assistance received by UNCTAD are as follows:

(a) States without any competition legislation may request information about restrictive business practices, their existence and possible adverse effects on their economy. This may involve a study of the restrictive business practices (RBPs) in their economy;

(b) States without competition legislation may request introductory seminars directed at an audience including government officials and academics, as well as business and consumer-oriented circles;

(c) States which are in the process of drafting competition legislation may request information on such legislation in other countries, and seek advice about drafting their competition legislation;

(d) States which have just adopted competition legislation may seek advisory services for setting up the competition authority; this usually includes training of officials responsible for the actual control of RBPs, and may involve training workshops and/or on-the-job training with competition authorities in countries that have experience in the field of competition;

(e) States which have already adopted competition legislation and have experience in the control of RBPs may wish to consult one another on specific cases and exchange information; seminars may be organized for such exchanges between competition authorities;

(f) States which wish to revise their competition legislation might seek expert advice from competition authorities in other States, so as to amend their laws in the most effective manner possible.

5. The main technical cooperation activities of the UNCTAD secretariat for the above-mentioned period are set out below.

A. National activities

6. UNCTAD assisted Thailand, Mauritania, Madagascar, Viet Nam and Ecuador in preparing, elaborating or reviewing national competition and/or consumer protection legislation. In particular, in the case of Madagascar, a competition expert engaged by UNCTAD prepared a report, suggesting amendments to the draft competition law of that country. UNCTAD also provided advisory services to Thailand in drafting guidelines for operational procedures of its competition authority. A competition expert engaged by UNCTAD prepared a report on assessing the experience of the countries of the Commonwealth of Independent States (CIS) in implementing competition policy. UNCTAD advised the Task Force of CARICOM countries preparing the revision of Protocol IX on competition policy and consumer protection issues. Also, the work on elaborating a common approach to competition policy for the member States of the Common Market for Eastern and Southern Africa (COMESA) was continued.

7. A national training workshop on competition policy was organized by UNCTAD in May 1999 in Zambia. The workshop's objectives were to enhance the capacity- and institution-building of the Zambia Competition Commission (ZCC) as well as to contribute to the educational process which the ZCC had launched with a view to creating a "competition culture" in Zambia. A national workshop on the implementation of the Zambia Competition Act is planned to be held in July 2000.

8. The workshop on the implementation of the Business Competition Act 1999 of Thailand, held in September 1999 in Bangkok, acquainted a wide range of participants with specific features of Thai competition legislation and enabled the Government to take note of specific recommendations, elaborated in the course of the workshop.

9. The workshop on issues related to competition law, lessons and recommendations for Viet Nam was held in September 1999 in Hanoi with a view to helping the Vietnamese Government prepare draft competition legislation.

10. A national seminar on competition law and policy was organized in December 1999 in Madagascar with a view to enabling the participating government officials and representatives of private business to understand the implications of the draft competition law once adopted and how it should be applied. Following the seminar, consultations were held between UNCTAD experts and personnel designated by the Government on issues related to the draft law.

B. Regional and subregional activities

11. In Africa, a Regional Seminar on Competition Policy, Trade and Development was jointly held by UNCTAD, COMESA and the Zambia Competition Commission from 2 to 4 June 1999 in Lusaka, Zambia. The aim of the seminar was to discuss those competition policy issues of importance to regional development and integration among the COMESA member countries; the interrelationship between the objectives and instruments of trade investment and competition policies; the relevance to COMESA of other integration grouping experiences with a common competition policy; and the role of cooperation and communication in competition law and policy.

12. In cooperation with the Governments of Morocco and Zambia, UNCTAD is organizing regional seminars on competition law and policy for African countries to be held in Casablanca on 18 and 19 July 2000 and in Livingstone on 26 and 27 July 2000.

13. In Asia, in cooperation with the Monopolies and Restrictive Trade Practices (MRTP) Commission of India and the Consumer Unity and Trust Society (CUTS) of India, UNCTAD held a Regional Seminar on Competition Policy for Asia-Pacific Region in Jaipur, India, from 13 to 15 April 2000. The seminar was attended by participants from competition authorities, ministries, business associations and consumer groups from Pakistan, Nepal, Hong Kong (China), Australia, Japan and the host country. It discussed specific issues related to participating countries' experiences, instruments of cooperation in the competition area, problems of competition and international trade, as well as competition and multilateral action for development. Also it had an opportunity to discuss the results of UNCTAD X and adopted the Jaipur Declaration, containing specific recommendations for action by the Fourth Review Conference.

14. In Latin America, a subregional workshop for CARICOM and its member States on competition law and policy was held on 12 and 13 October 1999 in Port-of-Spain, Trinidad and Tobago. It was organized by UNCTAD jointly with the CARICOM secretariat, the European Union (EU), the University of the West Indies and the Institute of Social and Economic Research. The objective was to strengthen Caribbean countries' knowledge of the main principles and application of competition law and policy. Also the seminar considered the scope and rules of competition applicable in regional integration agreements and focused on the issue of global and hemispheric trade, liberalization and competition.

15. In cooperation with the Costa Rican Commission for the Promotion of Competition and the United Nations Economic Commission for Latin American and the Caribbean (ECLAC), a Regional Seminar on Competition Law and Policy is to be organized by UNCTAD in San José from 30 August to 1 September 2000.

16. In cooperation with the Antimonopoly Committee of Ukraine and the European Commission, UNCTAD is involved in the preparation of the Regional Conference on Competition Policy for CIS countries and countries of Central and Eastern Europe, to be held in Kiev, Ukraine, on 13 and 14 July 2000. In addition, UNCTAD participated in a regional meeting of the CIS antimonopoly bodies' leadership, organized in September 1999 in Moscow, Russian Federation, together with the Inter-State CIS Council on Antimonopoly Policy and the Russian Ministry for Antimonopoly Policy and Support of Entrepreneurship.

C. Participation in seminars and conferences

17. During the period under review, UNCTAD staff members took part in a number of seminars, workshops and conferences related to issues of competition law and policy and consumer protection. In particular, resource persons from UNCTAD made substantive presentations and/or participated in discussions at the following meetings:

(a) The IXth International Conference on Competition, held in Berlin in May 1999 and organized by the German Federal Cartel Office and the German Foundation for International Economic Development;

(b) The International Conference on Competition Policy and Economic Adjustment, organized in Bangkok in May 1999 by the World Bank, the Organization for Economic Cooperation and Development (OECD) and the Global Forum on Competition Policy of the International Bar Association;

(c) The OECD Conference on Trade and Competition, held in Paris in June 1999;

(d) The Multilateral Trade, Investment and Competition Policy Capacity-Building Seminar, organized in July 1999 in Jaipur, India, by the Consumer Unity and Trust Society (India) and the Pro-Public (Nepal);

(e) The 14th Session of the OECD Committee on Competition Law and Policy (Paris, October 1999);

(f) The International Conference on Competition Policy and its Institutions (Managua, Nicaragua, November 1999), organized by the German foundation Cooperation for Development (GTZ);

(g) The Forum on New Trends in Competition Law and their Implications for Business in Central and Eastern Europe and the CIS Countries, co-organized in November 1999 in Brno, Czech Republic, by the United Nations, the Economic Commission for Europe (ECE) and the Czech Office for Protection of Competition;

(h) The International Conference on Competition Policy for the Cyber-World (New York, November 1999), organized by Columbia University, New York;

(i) The 4th International Symposium on Competition Policy (Seoul, Republic of Korea, December 1999), organized by the Korean Fair Trade Commission and OECD;

(j) The Seminar on the Determination and Control of Dominant Positions under the Trade Competition Act 1999 of Thailand, organized by the Department of Internal Trade of Thailand in Bangkok in February 2000;

(k) The 78th and 79th Meetings of the OECD Committee on Competition Law and Policy (Paris, February and June 2000);

(l) The ASEAN Workshop for the Launching of the Regional Training/Resource Centre for ASEAN Countries on Competition Law and Policy (Bangkok, March 2000), organized by the Australian Competition and Consumer Commission;

(m) The Second International Competition Symposium, organized by the Turkish Competition Authority in Istanbul in March 2000;

(n) The Asia-Pacific Economic Cooperation Forum (APEC)/Partners for Progress (PPF) Course on Competition Policy for APEC member economies, held in March 2000 in Bangkok;

(o) Colloque international sur Concurrence et Compétitivité, organized by Centre d'Etudes et de Recherches Caraibeénnes in May 2000 in Pointe-à-Pire, Guadeloupe;

(p) The International Conference on Competition Policy and Economic Growth, organized by the World Bank and bilateral donors for ASEAN countries in May 2000 in Jakarta, Indonesia;

(q) The Workshop on Competition Policy in Indonesia: Review of Technical Assistance Programme in the Implementation of the New Adopted Competition Law (Jakarta, May 2000).

III. INFORMATION ON TECHNICAL COOPERATION OF MEMBER STATES AND INTERNATIONAL ORGANIZATIONS

A. Technical assistance provided, planned or received

This subsection provides a summary of the replies received to the Secretary-General's note TDN 915 (1) of 22 November 1999, requesting information on technical cooperation activities in the area of competition law and policy.

Brazil

The Conselho Administrativo de Defesa Economica (CADE) stated that among various actions related to the promotion of competition it had promoted an International Seminar on Competition Policy in MERCOSUR, held in October 1999. Its representatives participated in the Seminar on Cartel Combat promoted by the United States Department of Justice as well as in the meetings of CT-5 MERCOSUR, the Free Trade Area of the Americas (FTAA), OECD and the World Trade Organization (WTO).

Canada

Technical assistance activities were provided on both a bilateral and a multilateral base. They consisted of in-house visits, presentations and consultations held in the Competition Bureau, as well as of participation by Canadian experts in various meetings, seminars and conferences held in the countries concerned or in third countries. In fiscal year 1998/1999 countries beneficiaries of technical assistance were Lithuania, the United Kingdom, South Africa, Australia, Estonia, Taiwan Province of China, Brazil and other Caribbean, South and Central American countries.

Chad

Within the Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries of the World Trade Organization (WTO), there are plans to draft a

competition law and organize a seminar on the subject. Also, a bill dealing with competition law within the regional framework of the Organization for the Harmonization of Business Law in Africa (OHBLA) is being studied. With regard to proposals on ways to mobilize new resources for technical cooperation in this area, it would be desirable to hold an awareness-raising campaign on technical assistance aimed at donors and to ensure that requests for technical cooperation assistance are properly coordinated.

Finland

During 1999, the Finnish Competition Authority (FCA) primarily had cooperation activities in the antitrust field with Estonia and the near regions of the Russian Federation. The bilateral technical cooperation with Estonia is based on an agreement concluded by the Finnish and Estonian Governments. An annual programme for Finnish-Estonian cooperation on economic and technical collaboration between the two countries was established in 1996, with the aim of preparing the Estonian Competition Authority for membership of the EU. With the Russian Federation, the technical cooperation is based on an agreement between the FCA and the Ministry of the Russian Federation for Antimonopoly Policy and Support of Entrepreneurship. The technical cooperation has consisted, in particular, of seminars and visits organized for the officials of the competition authorities and judges on competition policy issues. The FCA has also rendered assistance on legislative and administrative issues and information technology. Within the framework of Finnish-Estonian cooperation, six seminars were held in 1999; the topics included competition rules in the fields of banking, insurance, agriculture and traffic, as well as the new legislative developments in the EU concerning vertical restraints and the White Paper on the application of articles 81 and 82. Six Estonian officials familiarized themselves with Finnish competition law and policy and the working methods of the FCA for a period of 10 days. The programme varied according to the special interests of the officials. Five judges from Estonian courts visited the Supreme Administrative Court and the Competition Council, where they also attended the proceedings. In accordance with the above-mentioned agreement between Finland and Russia, two officials worked at the FCA for a period of one week.

Germany

In 1999 the Federal Cartel Office (FCO) received delegations from the following countries and territory (excluding the European Union and the United States: Japan, Mongolia, Poland, China, Kenya, the Republic of Korea, Indonesia, Bulgaria and Taiwan Province of China. These delegations sought information on German competition law, and the structure and functions of the FCO. During the same year technical assistance was provided to the Governments of Armenia, Brazil, Colombia and Slovenia. Experts from the FCO participated in seminars, workshops and conferences in Latvia, Pakistan, Austria (OECD seminar for 17 economies in transition), South Africa, Viet Nam, Thailand, Nicaragua and China.

Indonesia

Indonesia has a new law on competition, which came into force on 5 March 2000 under the title of the Law on the Prohibition of Monopoly Practices and Unfair Business Competition. For the implementation of this law, Indonesia has accepted technical assistance from the Economic Law and Improved Procurement Systems Project-United States Agency for

International Development (ELIPS-USAID) and GTZ Germany. This technical assistance has been provided in the form of a course for several government officials as part of the preparation for the establishment of a Commission for the Control of Business Competition and seminars in a number of cities in Indonesia for the socialization of the new law. The Governments of Canada and Japan, as well as the Asian Development Bank, will also provide technical assistance to Indonesia in this matter.

Japan

The Japan Fair Trade Commission (JFTC) has been holding several training courses on competition policy. One of the training courses brings together operational-level staff members of the competition authorities in developing countries and countries with economies in transition. Although a five-year course beginning in fiscal year 1994 was originally intended, it was decided to continue for an additional 10 years because of its effectiveness regarding the capacity-building of the course competition agencies. Other training courses of the JFTC are held by country. The beneficiaries have been China, Thailand and the Russian Federation. The JFTC has, in addition, been sending its experts for more in-depth technical assistance on competition policy to a number of developing countries and countries with economies in transition, namely Thailand, Malaysia, Viet Nam, Lithuania and Latvia. It often sends its experts to international conferences. In the framework of the Partners for Progress initiative of APEC, the JFTC has been coordinating a five-year training programme on competition policy with the Thai Government since fiscal year 1996. This programme offers a good opportunity to exchange information and experience in the APEC region. The fourth segment was held in Bangkok in March 2000, with intensive discussion on specific topics in subgroup meetings.

Jordan

The Government of Jordan has received technical assistance and consultancy from the World Bank for drafting a law on competition policy in Jordan. Local lawyers with the assistance of experts from the World Bank conducted a preliminary study on the status quo of competition practices in Jordan, and the need for drafting a law on competition policy in the future. UNCTAD had provided to the Government of Jordan many publications regarding competition policy.

Kenya

The Monopolies and Prices Commission (MPC) stated that in 1998 it had participated in the following international cooperation activities:

(a) UNCTAD and the Kenyan Government co-sponsored a course on competition policy and law in Nairobi at the Kenya Institute of Administration, which drew participants from Zambia, Malawi, Zimbabwe and Kenya;

(b) Zimbabwe's Ministry of Trade and Industry requested the MPC to provide it with information on job description and terms of reference for competition officials, and sent two senior officials for attachment;

(c) The MPC participated in the National Symposium sponsored by the United Nations Development Programme (UNDP) and organized to discuss the Malawi Competition Bill;

(d) The MPC participated in the UNCTAD Regional Seminar on Competition Law and Policy in Cairo;

(e) The Office of Fair Trading and the Monopolies and Mergers Commission of the United Kingdom hosted one official from the MPC for an internship programme;

(f) The MPC participated in the session of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, a symposium on trade and competition policies which was organized by UNCTAD, WTO and the World Bank, and in the WTO Working Group on the Interaction between Trade and Competition Policy;

(g) An official from the MPC attended the antimonopoly group training course at the Japanese Federal Trade Commission (JFTC) in Tokyo;

(h) The MPC provided consultancy services to the Zambia Competition Commission on a beer-sector case at the request of Zambia;

(i) Kenya's proposed Competition and Fair Trading Bill was sent to UNCTAD for comments. The EU and the Italian Competition Agency provided comments on the Bill;

(j) The United States Federal Trade Commission and the Department of Justice hosted two Kenyan officials for a two-week attachment programme sponsored by UNCTAD.

In 1999 an official from the Commission attended the antimonopoly group training course at the Japanese Federal Trade Commission in Tokyo.

Lithuania

The greatest part of technical assistance was provided by the European Commission and financed from Phare funds. Under the Support to European Integration in Lithuania Phare project "Support for Antitrust Enforcement" significant assistance was received in the field of competition in 1999. Several seminars were organized for representatives of the Lithuanian Competition Council and other public authorities. The Lithuanian side had an opportunity to learn about competition enforcement in Ireland, which also provided important assistance in drafting some secondary legislation necessary for effective enforcement of the Lithuanian Law on Competition. The European Commission's TAIEX bureau provided technical assistance for the Competition Council mostly in the form of seminars and conferences on competition policy held in Vilnius. Every year the European Commission's Directorate IV organizes training sessions in Brussels for the staff of Competition Councils and conferences for Eastern and Central European countries on competition policy. It is expected in the year 2000 to start the implementation of the Twinning Project in the framework of the Phare programme, which will continue in the year 2001. The Twinning Project will be focused on the completion of the approximation of legislation to that of the European Union, further strengthening of the

institutional capacity, structures and procedures of the Competition Council, extensive staff training, etc. Under the OECD Baltic Regional Cooperation Programme, a Conference on Competition Policy was held in Riga in 1999, and surveys on "Competition law and policy in the Baltics" and "Competition enforcement in Lithuania" were prepared. In 1999 cooperation took place between the Danish Government and the Lithuanian Competition Council in drafting the secondary legislation necessary for enforcement of the Lithuanian Law on Competition. In accordance with bilateral agreements this cooperation will continue in the year 2000. An important element in establishing the fundamentals of competition legislation and cooperation was the adoption by resolution No. 4/99 of 26 May 1999 of the Association Council, of rules necessary for implementation of articles 64 (l) (i) and (2) of the Europe Agreement establishing an association between the European Commission and the Republic of Lithuania.

Malta

The Office of Fair Competition (OFC) sent one of its legal advisers to lecture and advise the Governments of Arab countries during the UNCTAD Arab Regional Seminar on Competition Law and Policy held in Bahrain in October 1998. A seminar was organized by the Chamber of Commerce in cooperation with the OFC at which a Swedish expert identified by UNCTAD was invited to participate as speaker. From 1994 onwards the OFC has always featured in annual meetings of UNCTAD, at which participants were able to exchange views and draw on the experiences of other countries.

Mauritius

Mauritius received technical assistance from UNCTAD: (i) in 1995 for a study of market concentration in Mauritius; (ii) in 1996 for the services of consultants to advise on the types of institutional framework for the country; and (iii) drafting competition legislation. Mauritius has not received any other form of assistance from other international agencies or States bilaterally or multilaterally.

Mexico

Following the recent establishment of competition authorities, Mexico carried out various activities relating to technical cooperation, particularly with those Latin American countries interested in learning from its experience. In particular, from 1996 to 1998, training was organized by staff of the Federal Competition Commission (CFC) and the competition authorities of Costa Rica. During a visit by the chairman of the Panamanian Competition Commission to the CFC in 1997, agreement was reached on organizing training activities in the CFC. In 1997, CFC staff received training in Japan at the "Anti-Monopoly Law and Competition Policy" workshop, a seminar on competition organized by the Institute for the Integration of Latin America and the Caribbean was held in Buenos Aires, and a seminar on competition organized by the United States of America and the Rio Group was held in Montevideo. Mexico also took part in the Eighth International Conference on Competition in Berlin. WTO, UNCTAD and the World Bank organized a joint symposium on competition policy in Geneva. The APEC workshops on competition policy, sponsored by the Fair Trade Commission of the Republic of Korea, were held in Seoul in August 1997. The International Seminar on Competition Law, organized by the Administrative Council for Economic Defence

(CADE) of Brazil, the World Bank and the OECD, was held in Rio de Janeiro in July. A training course organized by the Competition Tribunal of Spain, the Spanish International Cooperation Agency and the Latin American Economic System (SELA) was held in May in Santa Cruz de la Sierra, Bolivia. The CFC was represented at all these events. There is a record of Mexico's participation in projects, seminars and agreements between 1995 and 1999, including the High-Level Seminar on Sustainable Industrial Development (November 1999, Japan), organized on behalf of the Government of Japan by the Japan International Cooperation Agency (JICA), and the seminar on competition policy for members of APEC (March 1999, Thailand).

Namibia

Assistance was received from the EU under the Transnational Trade and Investment Development Programme (TTIDP) of its Cross-Border Initiative (CBI). This assistance enabled the Ministry of Trade and Industry (MTI) to develop draft legislation appropriate to the Namibian situation. An economist and two legal advisers in conjunction with local Namibian counterparts in the Ministry carried out the work. The project was successfully completed because it was participatory, having received input from all the stakeholders, such as the MTI Management Team, including the Minister, his Deputy, the Permanent Secretary, a judge of the High Court of Namibia and representatives of the following institutions of the Ministry of Justice, the Office of the Attorney-General, the Ombudsman, the University of Namibia, the Law Society and the Namibian Chamber of Commerce and Industry.

New Zealand

New Zealand has provided speakers for, and participated in, the APEC Partners for Progress seminars, which have been held on an annual basis. The main focus has been on developing capacity and building institutional capability in APEC developing economies. In 1999, New Zealand provided a representative for a conference jointly organized by the OECD and the Fair Trade Commission of Taiwan Province of China. This conference covered practical issues such as institution-building and the relationship of competition authorities with other parts of Government, based on OECD best practices. This was part of the OECD competition policy outreach work in Asia. New Zealand is continuing to evaluate the potential to use both bilateral and multilateral mechanisms for greater powers for the sharing of information between the Commerce Commission, the domestic competition regulatory agency and overseas competition and enforcement agencies. It intends to continue to assist in technical cooperation activities in the area of competition law and policy, where it is able to commit resources. Areas where fresh resources could be committed to technical assistance measures are: (i) the promotion of competition law measures within a broader competition policy framework; (ii) the provision of independent research expertise to evaluate whether target benefits in productive efficiency, resource allocation and pricing are being delivered; (iii) the provision of aid from experienced partner countries in capacity-building regulatory institutions, including regulatory agencies, legal and consumer advocacy bodies and community education initiatives; and (iv) the sponsorship of cross-border regional regulatory forums. Overall, there is a need to ensure that the development of competition law occurs in the context of a broader competition policy. Any measures that would contribute to developing the understanding of broader competition policy frameworks would be welcomed. Many developing economies are only now establishing competition

agencies, and there is a leap in terms of skills, intensity and expense of regulatory effort. It would be useful to assist in building up in accordance with an accelerated timetable skills in, and a record of enforcement of, competition and consumer law. The second area for attention is the role of regulation and the interface with competition law and policy. Developing countries could benefit from technical cooperation measures concerning the regulation of network utilities, particularly in the incentive regulation of utilities. Overseas experts in both competition policy and utility regulation who may be brought in cannot be expected to have an appreciation of the public interest issues flowing from regulatory decisions if they lack experience in competition and consumer law. It is important to draw on the experience of those developing/transition countries that are more advanced in implementing competition policy and have had some success in doing so. Peru and Poland are examples of such countries. These countries have the best appreciation of what is involved in developing new institutions and provide useful models.

Nicaragua

Experience in the area of competition law and policy is relatively recent, going back only four years; it is dealt with by the Special Dereuglation Unit of the Ministry of Development, Industry and Trade, which is funded by the German Technical Copoeration Agency. I must also inform you that all we have received through UNCTAD has been a seminar on competition law and policy for Nicaragua held in November 1994.

Pakistan

The Monopoly Control Authority (MCA) organized a Regional Workshop on Harmonization of National Competition Policies as a Part of Economic Cooperation in the SAARC Region in February 1999. The workshop was organized in collaboration with the German Foundation for International Development (DSE) and the UNCTAD secretariat. It provided a forum to the representatives of the South Asian Association for Regional Cooperation (SAARC) for discussing issues related to competition policy and for interactive sessions with the UNCTAD and German experts. Discussions on case law pertaining to both developed and developing countries proved to be informative in identifying specific measures for implementation. The MCA suggests that UNCTAD organize on-line training courses. This would greatly help developing countries while being cost-effective for both the recipients and the providers.

Peru

The second internship programme in the National Institute for the Defence of Competition and the Protection of Intellectual Property (INDECOPI) for government officials in America is planned for the second half of 2000. Its aim is to foster institution-building in organizations and institutions from American countries involved in promoting competition and/or intellectual property, by disseminating the methods applied by INDECOPI in its various fields of activity. Between 1998 and 2000, the competition-policy projects and activities carried out in Peru as a result of international cooperation included: (i) an international seminar on competition policy organized jointly with the Organization of American States in 1998; (ii) the Project to Strengthen the Regulation and Promotion of the Market Economy, carried out jointly with the Inter-American Development Bank and the Andean Development Corporation

between 1998 and 2000; and (iii) the International Workshop on Competition Policy, organized jointly with the OECD in 1999. In 1998, INDECOPI officials took part in Washington in the course on competition policy funded by the World Bank and the Inter-American Development Bank. INDECOPI suggests that UNCTAD should encourage organizations such as the International Organization for Migration, the World Bank or the Inter-American Development Bank (through its intra-regional technical cooperation programme) to set up a special budget line for the training and exchange of experts on competition policy, which would make it possible to offer specialized internships for officials from developing countries in organizations with a proven track record and to offer short-term consultancies. It could also provide a common denominator at the international level for the way cases of competition are dealt with and for the competition policies introduced in each country.

Philippines

The Philippine Tariff Commission has taken the initiative for the formulation of a draft competition policy framework for the Philippines. In 1998, the Commission was the recipient of technical assistance from UNDP for a project entitled "Developing a comprehensive fair trade and competition policy framework in the Philippines", financed by the United Nations Office for Project Services (UNOPS). In March 1999, the Institute for Research into International Competitiveness (IRIC) of the Curtin University of Technology in Perth, Australia, submitted a comprehensive research study entitled "A policy framework for competition policy in the Philippines". A series of seminars organized by the Commission for judges, lawyers, academics, business leaders, consumer groups and key government agencies were held in April 1999 in response to the presentation of the Curtin University of Technology consultants. As a follow-up to the first phase of the competition policy framework project, the Tariff Commission proposed a continuation of the joint Australia-Philippines-APEC cooperative efforts on trade and competition policy. This project was approved in November 1999 under the Philippines-Australia Governance Facility of the Australian Agency for International Development (AUSAid) and began in February 2000. The Tariff Commission has sent participants to the following training programmes: an APEC-sponsored seminar on competition policy in Australia, the series of APEC courses/seminars/workshops on competition policy in Thailand, and the International Training Programme on Competition Policy in Seoul, Republic of Korea.

Poland

The Polish Office for Competition and Consumer Protection (OCCP) provided assistance on the basis of bilateral agreements to competition authorities of the Russian Federation, Lithuania and Ukraine. These agreements provide for an exchange of experts, and of information and experience which has been acquired particularly by Poland in the course of its preparation for accession to the EU and of accession negotiations. The OCCP is planning to develop closer cooperation with Baltic countries. The OCCP received the following assistance: (i) EU assistance provided since 1991 within the framework of the Phare programme, concerning harmonization of Polish legislation and preparations for the accession negotiations, including advising, training and study visits; (ii) OECD seminars and workshops organized in the period preceding Poland's accession to the OECD; (iii) United States (Federal Trade Commission and Department of Justice) advisory assistance in the years 1992-1995; and (iv) French (DGCCRF)

assistance concerning consumer protection and negotiations on accession to the EU, including advising and study visits, in the years 1994-1998. The OCCP suggested that the development of closer bilateral and multilateral cooperation among competition authorities of individual countries (including study visits, exchange of information and investigatory assistance) could be further explored.

Romania

In 1999, the Romanian Competition Council (RCC) benefited from three technical cooperation activities. First, United States technical assistance was provided through the United States Agency for International Development (USAID) in the form of a technical assistance programme, envisaging long-term assistance through a special adviser from the United States Federal Trade Commission at the Competition Council and short-term assistance in the form of short-term missions. The experts of the Competition Council and the Competition Office also took part in seminars organized in collaboration with specialists from the United States Federal Trade Commission and the Department of Justice's Antitrust Division. Second, technical assistance was provided by the EU Commission through TAIEX in the form of one-week training sessions for two experts of the RCC at the European Commission's DG IV. In accordance with the provisions of the European Association Agreement (EU-Romania), the RCC was involved in the pre-accession programme and in the process of harmonization of the Romanian competition legislation. Within the 1999 Phare budget a project to strengthen administrative capacity in the field of competition and State aid was approved. Both the Competition Council and the Competition Office will benefit from this project. It envisages training sessions with the competition authorities of EU member States, exchange of experience and seminars organized in Romania and conducted by EU specialists, as well as assistance provided by an EU expert to the RCC in the area of adoption of the secondary legislation and enforcement of the State aid legislation. Third, within the multilateral assistance programme provided by the OECD to Central and Eastern Europe countries, the RCC experts attended a two-week seminar in Vienna.

Slovakia

In 1999 the Antimonopoly Office in cooperation with the British Know-How Fund elaborated a project to strengthen the independence of the Office and build the capacity for implementation of effective competition in Slovakia in accordance with the EU requirements. Under the project technical assistance will be provided through a series of structured visits to Slovakia by competition experts. Access to information concerning specific competition cases that have been investigated by other authorities is expected to increase through the establishment of contacts between the Office and the competition authorities in EU member States. The project will assist the Office in assessing the current constraints, evaluating the options for alleviating them and supporting the Office in moving towards a more planned and strategic method of work. It will also assist the Office in developing annual operational plans and targets. From October 1998 to June 1999 the Office cooperated with the European consortium within the framework of Phare programme assistance with approximation of Slovakia's legal rules to the EU legal rules. This cooperation resulted in consultations, written analyses, EU documents and further advisory activities concerning approximation of the Slovak Act on Protection of Economic Competition.

Slovenia

The Competition Protection Office (CPO) has provided technical assistance in the form of short-term study visits to the Governments of Bosnia and Herzegovina and the former Yugoslav Republic of Macedonia. Slovenia has received multilateral assistance from the OECD in the form of yearly seminars on competition policy; WTO in the form of specialized seminars on dumped and subsidized imports; and from the EU in the form of a collective traineeship for antitrust and State aid officials and specialized Phare seminars and conferences on antitrust activities, State aids and dumping. Bilateral assistance was provided by the EU through the Phare and TAIEX programmes, within the framework of which certain EU member States provided technical assistance to the CPO in the form of study visits, short-term advisory missions, expert meetings and commentaries on legislation. Bilateral assistance was also received from the following countries: France - short-term study visits and advisory missions; Germany - bilateral technical assistance under the TRANSFORM programme in the form of short-term advisory missions and study visits; Denmark - a seminar on competition policy and State aid; United States - short-term advisory missions, short-term study visits, specialized workshops, provided by the Federal Trade Commission and the Department of Justice; and Sweden - a short-term advisory mission on the subject of State aid. The CPO suggests that technical assistance should always be tailor-made, as problems are different from country to country. Special importance should be accorded to the process of implementation of the corresponding legal framework. Certain countries, Slovenia included, could provide other countries with relevant technical assistance in the area of their experience with the introduction of competition, implementation of legislation and negotiations with other partners (i.e. WTO, EU, etc.).

Sri Lanka

The German Foundation for International Development (DSE), with the assistance of UNCTAD, (i) conducted in April 1997 a seminar on "Enforcement of national laws on competition and restrictive business practices in developing countries", held in Sri Lanka for the benefit of staff of the Fair Trading Commission (FTC) and (ii) provided funding to three FTC members to participate in a workshop on "Harmonization of national competition policies as an integral part of economic cooperation", jointly organized by DSE, UNCTAD and the Pakistan Monopoly Control Authority and held in Pakistan in February 1999. The Japan International Cooperation Agency (JICA) provided funding for a member of the FTC to participate in a group training course on "Antimonopoly laws and competition policy", organized by the JICA and the Japan Fair Trade Commission, and held in Japan in August-September 1999.

United States of America

During the 24-month period from January 1998 through December 1999, the United States federal antitrust agencies (the Department of Justice and the Federal Trade Commission): (i) provided long-term advisers to Argentina, Romania and South Africa; (ii) sent one or more short-term technical cooperation missions to Argentina, Brazil, the Dominican Republic, India, Romania, Slovakia, Slovenia, South Africa, Trinidad and Tobago and Ukraine; (iii) hosted as interns competition officials from Argentina, the Czech Republic,

Jamaica, Kenya and Slovakia; and (iv) participated in OECD competition seminars in Brasília (Brazil), Kiev (Ukraine), Lima (Peru), Moscow (Russian Federation) and Vienna (Austria). Most of the expenses of these technical cooperation activities were funded by USAID.

Andean Community

At the present time, the Andean Community applies decision No. 285 on rules to prevent or correct distortions of competition arising as a result of restrictive business practices, adopted by the Commission of the Cartagena Agreement in March 1991. Its scope is restricted to practices originating in the Andean subregion or those involving a company engaged in economic activities in a member country and which have no effects in the subregion. In the latter case, the domestic legislation of the member country affected applies. Member countries have agreed to go ahead with action that might result in changes to decision No. 285. In 1998, using European Union funding, the General Secretariat of the Andean Community hired two consultants for three months to prepare advisory documents on possible changes to decision No. 285 and another consultant for one month to collect information for an assessment of the national competition laws and authorities in member countries. The European Union is being approached at the moment with a view to preparing an assistance project, although the latter has not yet been clearly defined. The General Secretariat also carried out two investigations pursuant to decision No. 285, in 1996 and 1997. One, at the request of a Venezuelan company, was into alleged collusion in the sugar-cane sector between companies from Colombia and Venezuela; the other, at the request of an Ecuadorian company, was into the alleged abuse of a dominant position in the subregional market for polypropylene film by companies from Colombia and Venezuela. The final decisions on those cases can be found in resolution 420 of the Board of the Cartagena Agreement and resolution 11 of the General Secretariat, which can be viewed on the Web site of the Andean Community (www.comunidadandina.org).

OECD

The major technical assistance projects conducted by the OECD in the area of competition policy in 1998-1999 are set forth below. Some of these projects were carried out jointly with the World Bank and many were carried out with the assistance of national competition authorities. The following major conferences were organized: 29-30 June 1999 - *Trade and Competition Conference* (with substantial assistance from the United Kingdom's Department for International Development and jointly organized by the Trade Directorate), attended by representatives of some 50 countries from Europe, North and South America, Asia and Oceania as well as representatives of several international organizations; and 27-28 May 1999 - *OECD/World Bank International Conference on Competition Policy and Economic Adjustment,* attended by representatives of Brazil, China, Taiwan Province of China, India, Indonesia, Malaysia, Russian Federation and Thailand. The following seminars were organized: (a) seminars at the Joint Vienna Institute: *Topics in Competition Policy*: these two-week seminars have typically involved delegates from the Competition Offices of Azerbaijan, Belarus, Bulgaria, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Romania, the Russian Federation, Slovakia, Ukraine, Armenia, Turkmenistan and Uzbekistan. Competition officials from the Czech Republic, Hungary and Poland also participated regularly until these countries became OECD member countries. The seminars are focused on actual competition cases submitted by the participating countries and have been held annually in

Vienna since 1993; (b) Russian Federation: (i) December 1999, *Workshop on Competition Policy in the Banking Industry*, attended primarily by staff of the Ministry for Antimonopoly Policy but with representation also from the Central Bank, research institutes and universities; (ii) September 1999, *OECD Seminar on Competition Policy*, attended primarily by staff of the Ministry for Antimonopoly Policy but with representation also from Armenia, Azerbaijan, Georgia, Kyrgyzstan, Ukraine and Uzbekistan; (iii) December 1998, *Enforcement of Competition Law in the Arbitrazh Courts*, attended by judges from the Arbitrazh Courts, officials of the Antimonopoly Committee and legislative assistants; (iv) August 1998, *Topics in Competition Policy*, attended primarily by staff of the Antimonopoly Committee but with representation also from Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Ukraine and Uzbekistan.

Ukraine: (i) June 1999, *OECD/FTC Seminar with Judges on Competition Policy* (jointly sponsored by the United States Federal Trade Commission), attended by the Ukrainian Supreme Court judges and staff of the Antimonopoly Committee; (ii) June 1999, *OECD/FTC Seminar on Effective Competition Policy* (jointly sponsored by the United States Federal Trade Commission), attended by the staff of the Antimonopoly Committee; (iii) June-July 1998, *Effective Competition Policy Enforcement*, attended by staff of the Antimonopoly Committee.

Regional Seminar at the OECD's Centre for Private Sector Development (Istanbul): October 1998, *Demonopolization of Markets*, attended by competition officials from Armenia, Azerbaijan, Bulgaria, Georgia, Kazakhstan, the Republic of Moldova, Mongolia, Romania, the Russian Federation, Turkmenistan and Ukraine.

Bulgaria: November/December 1998, *OECD Competition Law and Policy in the Balkan Countries*, attended by officials from Bulgaria, Romania, Croatia and Slovenia.

Baltic seminars: (i) May 1999, *OECD Conference on Competition Policy and Enforcement in the Baltic Region*, attended primarily by competition authorities from Estonia, Lithuania and Latvia, and officials from the Antimonopoly Ministry of the Russian Federation, including the St. Petersburg/Leningrad Regional Office, the Karelia Regional Office and the central office in Moscow; (ii) October 1998, Meeting with heads of the Baltic competition agencies to plan the OECD/Baltic Regional Cooperation Programme to start in spring 1999.

Latin American seminars: (i) December 1999, *OECD/CADE Seminar on Competition Policy in the Airline Industry in Brazil*, attended by officials from Italy, Mexico, the United Kingdom, the United States and the OECD, and from the Brazilian Senate, the Ministry of Defence, the Ministry of Justice and CADE, as well as representatives from the major airlines; (ii) November-December 1999 (organized in conjunction with Peru's Instituto Nacional de la Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI)), *Workshop on Competition in the Telecommunications, Air Transport and Energy Sectors*, attended by officials from Argentina, Brazil, Jamaica, Mexico, Panama, Peru and South Africa; (iii) February 1999, *OECD/CADE Competition Policy Case Study Seminar*, attended by officials from Argentina, Brazil, Jamaica, Mexico, Panama, Peru and South Africa; (iv) July 1998, *Competition Policy in South America*, attended by Brazilian competition officials and focused on pre-merger notification.

Asian events: The OECD secretariat has organized or participated in organizing and presenting OECD-sponsored competition policy events in Asia, including: (i) Bangkok, December 1999 (organized in conjunction with Taiwan Province of China's Fair Trade Commission), *International Cooperation Programme on Competition Policy; Seminar on the Role of Competition Policy and Competition Authorities*, attended by officials from Taiwan Province of China, Hong Kong (China), Indonesia, Malaysia, the Philippines, Singapore, Thailand and Pakistan; (ii) Shanghai, December 1999, *International Conference on Legislating China's Antimonopoly Law*, attended by Chinese government officials and academics; (iii) Seoul, summer 1998 and 1999, *Asian Competition Policy Training Programme for APEC countries* attended by officials from Taiwan, Province of China, Thailand, Singapore, the Russian Federation, the Philippines, Malaysia, Indonesia, Hong Kong (China), China (co-sponsored with KFTC); (v) Beijing, November 1998, *Forum on China's Draft Antimonopoly Law*, attended by Chinese government officials and academics. The OECD secretariat has also provided panellists for *Japan-sponsored training seminars for APEC countries*, organized in 1998 and 1999 in Thailand.

African events: August 1999, OECD provided a lecturer as part of the initial training programme of the Competition Commission of South Africa attended by South African officials and members of the Southern Africa Development Community.

Advice on laws, commentaries and methodologies was provided to the Russian Federation: (i) 1999, comments were provided on proposed amendments to the law on natural monopolies; (ii) 1998, comments were provided on proposed amendments to the competition law.

Other activities included (i) a joint OECD/World Bank publication entitled *A Framework for the Design and Implementation of Competition Law and Policy*, for transition and developing countries (published in 1998); (ii) a *Glossary* of the legal and economic terms fundamental to competition law and policy.

World Trade Organization

Paragraph 22 of the Singapore Ministerial Declaration provides that the technical cooperation programme of the WTO secretariat shall be made available to developing and, in particular, least-developed country members to facilitate their participation in the work programme on the interaction between trade and competition policy, which is set out in paragraph 20 of the Declaration. During 1999, a number of activities were undertaken pursuant to that mandate. Two symposia on issues concerning competition policy and the multilateral trading system were held at the WTO. The first, held in April 1999, dealt with the views of civil society organizations on questions concerning the role of competition policy in a healthy market economy and its relationship with the multilateral trading system. These symposia were presented with financial assistance from UNCTAD, the World Bank and other organizations, as well as with input from their staff. It has been decided that the papers and proceedings of these symposia along with those of two other symposia held earlier will now be published in a volume. The volume is to be jointly edited by members of the secretariats of the WTO, UNCTAD and the World Bank and is intended as a further contribution to public understanding of the issues discussed at the symposia. The WTO secretariat appreciates the collaboration of the UNCTAD

secretariat as well as that of the World Bank and other organizations in these activities. In May 1999, the WTO secretariat, jointly with the Asian Development Bank, presented a regional seminar on trade remedies and competition policy in Chiang Mai, Thailand. The seminar was attended by officials from a large number of countries from South, East and South-East Asia. During 1999, staff members of the WTO secretariat participated in conferences, workshops and training seminars sponsored by other organizations that dealt with the interface between trade and competition policy and that were intended particularly for the benefit of developing countries. These included: (i) an APEC Workshop on Competition Policy and Deregulation in Christchurch, New Zealand, in April-May 1999; (ii) a training seminar for staff of non-governmental organizations sponsored by the Consumer Unity and Trust Society (CUTS) in Jaipur (India) in July 1999; (iii) a seminar on competition policy for CARICOM member countries sponsored jointly by UNCTAD, the CARICOM secretariat and the University of the West Indies in October 1999; and (iv) a conference on competition policy in MERCOSUR organized by the Brazilian national competition agency, CADE, in November 1999. Staff also participated in conferences of a more academic nature which nevertheless were intended to share perspectives and promote understanding of the issues. As a further element of the WTO secretariat's technical cooperation activities relating to the interaction between trade and competition policy, lectures on the subject were presented as part of the organization's trade policy course. In 1999, such lectures were given in four regular sessions of the course and two sessions of a short version of the course. Lectures and presentations were also given for various organizations that visited the WTO during the year. An important activity of WTO staff members throughout the year was the provision of information and advice, on an ongoing, informal basis, to delegations to facilitate their participation in the work of the WTO Working Group on the Interaction between Trade and Competition Policy. In the year 2000, it is planned that the technical cooperation programme of the WTO secretariat in the area of the interaction between trade and competition policy will feature increased emphasis on regional workshops and seminars. This reflects demands made for such programmes by a number of WTO members at the Seattle Ministerial Conference and in the preparatory process leading up to it. The secretariat expects to invite the participation of UNCTAD staff members in these programmes, and looks forward to collaborating with the UNCTAD secretariat and other intergovernmental organizations in other activities as well.

B. Requests for technical assistance

This subsection contains extracts from the replies received, which are related to requests for technical assistance with identification of specific competition law and policy areas or issues which States would wish to see receive priority attention.

Jordan: The Ministry of Industry and Trade has indicated that assistance is needed in the following areas: (a) *studies* regarding (i) the structure of practices in Jordanian industry; (ii) government practices in respect of restructuring different economic sectors and its relation to privatization in Jordan; (b) *training needs*: (i) training future judges and investigators specialized in the application of competition policy law; (ii) assisting the Ministry of Industry and Trade in establishing a unit to implement competition policy in Jordan. In this regard, Jordan seeks assistance in the following areas: (1) providing the Ministry of Industry and Trade with computer systems and hardware; (2) inviting economic advisers specialized in drawing up competition policy to Jordan; (3) inviting legal experts in competition law to assist the

Government in preparing regulations and instructions for the implementation of competition law; (4) providing the Ministry of Industry and Trade with the necessary publications and studies regarding the experience of other countries in the application of competition policy; (c) *further suggestions* relate to (i) organizing workshops and regional seminars aimed at educating UNCTAD member States about competition policy and antitrust laws; and (ii) cooperation between UNCTAD and the International Trade Centre (ITC) in educating the private sector in developing countries about the evolution of governmental policies on competition, educating the private sector about the expected effects of the application of antitrust laws, and defining the appropriate methods which the private sector should pursue in an attempt to accommodate itself to the changes that resulted from the application of antitrust laws.

Kenya: The Monopolies and Prices Commission would be most grateful if technical assistance could be extended in the following areas: (a) *training*: the officers in the Commission would benefit from one to three months' attachment to agencies with experience in competition policy and law implementation; (b) *publicity and awareness*: as most of the general public, government agencies, business enterprises and management countrywide are unaware of the existence of the law, resources should be extended to help the Commission publicize competition policy; (c) *review of the Act*: resources are required for review of the existing law, enacted in December 1988, to make it more suitable, flexible, effective and reflective of the needs of a liberalized economy; (d) *regional cooperation*: member States of the COMESA region and the East African Community (EAC) could benefit a great deal from competition policy seminars. The Commission requests technical assistance in hosting such regional seminars.

Malta: In the light of the need to introduce merger control, the Office of Fair Competition would like to receive expert assistance on the drawing up of legislation and on the way mergers should be tackled, given the circumstances of a small market economy. The Office also requests expert advice on how to assist public monopolies which at present are not covered by the Maltese Competition Act, so that they are able to operate in a competitive market and become subject to competition law. Meanwhile, greater access to Web sites is considered useful in mobilizing technical cooperation.

Namibia: Once the Namibian Competition Bill has been passed by Parliament and becomes law, further technical assistance would be required in the development of training, enforcement, monitoring and inspection programmes.

Nicaragua: The Special Deregulation Unit of the Ministry of Development, Industry and Trade (MIFIC) needs: (a) to have its officials visit other organizations, particularly in Latin America, to observe best practices that could be adapted to the Nicaraguan context (by means of internships, seminars/workshops and courses); and (b) to receive visits from officials from organizations in Latin America and the Caribbean who can provide advice and seminars.

The Competition and Deregulation Department of MIFIC needs: (a) to learn more and find out about the experience of countries in applying competition laws; (b) find out about methods and procedures for use in studies and monitoring of key markets. The following topics would be of interest to interns: deregulation; the administration of competition law and policy; unfair trading practices; negotiation and dispute settlement (in specific cases of economic actors); techniques and procedures for use in respect of competition and consumer law; and the

functioning and effectiveness of collegiate bodies administering legislation on competition and consumer rights. The aim is to strengthen the analytical capacity of departments through assistance from experts in these subjects, who would equip us with the necessary tools to assume new roles successfully. The satisfactory administration of laws, the use of technical tools and analytical procedures, and policy design and implementation require proper advice supplied by experts with extensive practical experience.

Pakistan: The Monopoly Control Authority (MCA) requested that a comprehensive study be conducted regarding the competition environment in Pakistan across various sectors of the economy, together with policy analysis and identification of measures for effective implementation of competition policy in the country. It was proposed that this study be followed by a training course for the MCA's officials on practical aspects of competition law enforcement, e.g. detection of cartels and calculation of market share for a product. The MCA would like that to be done in cooperation with UNCTAD on a priority basis, since the MCA lacks both the financial and human resources to enforce the law effectively. The MCA is preparing proposals regarding possible avenues for cooperation with OECD and the Australian Consumer and Competition Commission. The MCA intends to request technical assistance with the following: (i) a comprehensive review of the monopolies law to bring the law into harmony with the changes that have occurred during the last two decades at national and international level; (ii) capacity-building to improve the qualifications/understanding of its staff in the form of refresher courses in the field of investigative techniques and methods for analysing competition cases. Such courses may be organized at the regional level since the competition authorities in the regions are facing similar problems; (iii) organization of a regional workshop to work out a concrete strategy for harmonization of policies and information-sharing on different cases/related issues amongst the region; (iv) development of MCA's web page; (v) operational attachments of MCA's officers in its counterpart institutions for a period of two to three months; (vi) sponsorship of specialized courses/degree programmes at graduate or master's level for the officers of the MCA; (vii) provision of books on a complimentary basis to update the MCA library on the following topics: competition law and policy; accounting; trade policy; industrialization; management information systems; computer-related books; case law regarding mergers, restrictive business practices; etc.

Peru: A request has been made for INDECOPI officials to follow courses and internships in various competition bodies, in order to receive training in market analysis and in dealing with competition-related cases.

Philippines: There are numerous training programmes and seminars on the basic principles of competition law and policy for government officials, especially for those belonging to the Tariff Commission and the Department of Trade and Industry. However, the Department of Trade and Industry would like to see more of those types of training programmes, which are extended to officials of the Department of Justice, the Securities and Exchange Commission, consumer groups, businessmen, industry associations and the academia.

Poland: As the transitional period of the Polish economy is gradually coming to an end, and Poland will no longer consider itself a "country in transition", the Polish Office for

Competition and Consumer Protection, having gained substantial experience in the field of competition law and policy under market economy conditions, has no further requests for assistance other than those already foreseen and planned in connection with accession to the European Union.

Romania: The need for permanent harmonization of competition and State aid legislation with the new and dynamic EU approaches, and the analysis of EU cases imply, the inclusion of a "community component" within the training of the Competition Council staff. In this respect, the Council has asked the Government of Romania to facilitate contacts with the competition authorities of EU member States with an institutional structure for enforcing and managing the competition and State aid rules similar to the Romanian one. Consequently, collaboration proposals with the Competition Council of France, Portugal and Belgium and with the Monopolies and Mergers Commission of the United Kingdom were designed to that end. Following a proposal by the Swedish Government, the Competition Council drew up a bilateral collaboration draft in the field of competition and State aid. The assistance requested by that project will be oriented towards organizing training sessions, exchange of experience and study visits at the Swedish Competition Authority and also seminars in Romania.

Slovenia: On the basis of the needs identified, the Competition Protection Office has established bilateral cooperation with relevant French and German institutions for a transfer of experience, particularly in the fields of relevant market definition, merger control, antitrust investigative techniques and demonopolization.

Sri Lanka: The Fair Trading Commission needs further technical assistance for capacity-building in the area of competition law and policy, and it would welcome further technical assistance from UNCTAD or any other international agency to develop the skills of its staff.